

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
3.6.2013	
DATE	SIGNATURE

3/6/2013

Case Number: 75253/10

PIETER WILLIAMS KAUFMAN

APPLICANT

And

MARTIHINUS JOHANNES ELS

1ST RESPONDENT

EMALAHLENI LOCAL MUNICIPALITY

2ND RESPONDENT

WITBANK DISTRICT OFFICE

3RD RESPONDENT

DEPARTMENT OF RURAL DEVELOPMENT & LAND REFORM

JUDGEMENT

JANSE VAN NIEUWENHUIZEN AJ

- [1] The applicant, being the registered owner of an immovable property, known as Portion 72 (a portion of portion 14) of the farm Leeuwpoot 283, Registration Division J.S., Province Mpumalanga ("the property"), seeks the following relief against the first respondent, the occupier of the property:

- "1. *Delivery by the 1st Respondent, to the applicant, the property known as Portion 72 of the Farm Leeuwpoot 283, Registration Division J.S. Mpumalanga, size 8.5653 hectares, held by deed of transfer T324/2010.*
2. *In the event of the 1st respondent failing to deliver the property to the applicant, an order that the 1st respondent and all other persons who occupy or hold possession through the 1st respondent are to be ejected/ evicted from the premises.*
3. *An order that the Sheriff of the above Honourable Court be authorised to do everything necessary, including but not limited to obtain the help of the South African Police Services to give effect to prayer 2 above and evict/eject the 1st respondent and all other persons who occupy or hold possession of the property through him."*

- [2] The first prayer is based on the *rei vindicatio*, whereas prayers 2 and 3 fall within the statutory framework of the Prevention of Illegal Eviction from and Unlawful Occupation of Land, Act 19 of 1998 ("the Act").

- [3] Notwithstanding the aforesaid, the applicant has failed to comply with the provisions of section 4(2) of the Act.
- [4] The first respondent opposed the relief claimed and filed a lengthy opposing affidavit. In his affidavit, the first respondent dealt in detail with his defence to the relief claimed by the applicant. The first respondent, however, did not rely on the fact that the applicant failed to comply with the provisions of section 4(2) of the Act.
- [5] Although the applicant's attorney stated, in the Heads of Argument filed on behalf of the applicant, that the application is one of eviction in terms of the Act, non-compliance with the provisions of the Act was, once again, not raised.
- [6] The applicant was represented at the hearing by Mr Kekana, who, for the first time, raised non-compliance with the provisions of section 4(2), as a defence. Section 4 (2) reads as follows:

"At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction."

[7] The proceedings contemplated in subsection (1) of section 4, is that of the eviction of an unlawful occupier from land.

[8] It is common cause between the parties that the applicant served a so-called "Notice of Termination of Right of Residence" ("termination notice") on the first, second and third respondents, prior to the launching of the present application. Service of the said notice was, however, not authorised and directed by a court order.

[9] Faced with this difficulty, Mr Vorster, who appeared on behalf of the applicant, urged me to find that the termination notice complies substantially with the provisions of section 4 (2) read with section 4(5) of the Act *alternatively* to grant an order in terms of prayer 1 of the notice of motion and to postpone prayers 2 and 3 *sine die*.

[10] In the premises, it is necessary to first of all, examine the contents of the termination notice and the circumstances surrounding the first respondent's knowledge of the present proceedings.

THE TERMINATION NOTICE:

[11] The notice consists of 6 pages and the relevant portions read as follows:

"

NOTICE OF TERMINATION OF RIGHT OF RESIDENCE

(THIS IS A VERY IMPORTANT NOTICE)

TO

MARTHINUS JOHANNES ELS

TAKE NOTICE

Pieter William Kaufman hereby gives you notice that your right to reside on Portion 72 of the Farm Leeuwpoort 283, Registration Division J.S. Mpumalanga, size 8.5653 hectare, held by deed of transfer T324/2010, has been terminated.

TAKE FURTHER NOTICE

Pieter William Kaufman is the owner of Portion 72 of the Farm Leeuwpoort 283, Registration Division J.S. Mpumalanga, size 8.5653 hectares, held by deed of transfer T324/2010, you are in possession of the farm and you do not have the consent of Pieter William Kaufman to be in possession of the farm.

TAKE FURTHER NOTICE

You are hereby given 2 (two) months notice to vacate the farm. Should you fail to vacate the farm in 2 (two) months after receiving this notice, Pieter William Kaufman will apply to court for an eviction order.

TAKE FURTHER NOTICE

The land to which this notice relate is the property on which you stay and is more fully described as Portion 72 of the Farm Leeuwpoort 283, Registration Division J.S. Mpumalanga, size 8. 5653 hectares, held by deed of transfer T324/2010

THE SUMMARY CONTAINED IN THIS NOTICE OF YOUR LEGAL POSITION IS INCOMPLETE. YOU MUST APPROACH AN ATTORNEY, THE DEPARTMENT OF LAND AFFAIRS, THE EMALAHLENI MUNICIPALITY OR THE LEGAL AID BOARD TO EXPLAIN YOUR RIGHTS TO YOU MORE FULLY, IF YOU CANNOT AFFORD AN ATTORNEY YOU MAY APPLY FOR LEGAL AID AT THE LEGAL AID BOARD OR YOU MAY APPROACH THE DEPARTMENT OF LAND AFFAIRS FOR ASSISTANCE. YOU ARE URGED TO GET ASSISTANCE AS SOON AS YOU GET THIS NOTICE.

.....

MORE INFORMATION

THIS IS A VERY IMPORTANT NOTICE

1. The **Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)** accords to everyone the right to have access to adequate housing.

Should you feel that an eviction will infringe that right it is incumbent on you to supply the owner with information

supporting that claim to enable him to place that information before Court.

2. The *Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997)* applies to you if you:

- 2.1. Live on land which is not situated in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships.
- 2.2. Live on land which belonged to another.
- 2.3. Had consent or another right in law to reside on the land.
- 2.4. Are not using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes.
- 2.5. Earn less than R5000.00

This Act gives the right to live on the land where you were staying on 4 February 1997, or at any time thereafter, provided that you had the permission of the owner or person in charge. It also gives you the right to carry on using any other land which the owner or person in charge gave you permission to use on or after that date. The Act makes it possible in certain circumstances, for these rights to be brought to an end. The owner or person in charge must act fairly, and follow the procedures set out in the Act. The first step that the owner or person in charge must take is to give you notice that your right to occupy has been terminated. This means

that the owner or person in charge of the land may go to court to get an order to evict if you fail to vacate farm within the period given in the notice.

Should you claim that this Act applies to you it is incumbent on you to supply the owner with information supporting that claim to enable him to place that information before Court.

3. ***The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No. 19 of 1998)*** provide for the prohibition of unlawful eviction and for procedures for the eviction of unlawful occupiers. In terms of this Act no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. The Act further provides that no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. The Act regulates the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances. The Act gives special consideration to the rights of the elderly, children, disabled persons and particularly households headed by women, and recognise that the needs of those groups should be considered.

If you do not claim that the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997) applies to you the owner or person in charge will comply with the procedures outlined in this Act before applying for your eviction."

- [12] The notice was served by the Sheriff on the applicant on 30 June 2010 and on the second (relevant municipality) and third (Rural Development and Land Reform) respondents on 18 June 2010.

LEGAL POSITION:

[13] In terms of the provisions of section 4(5) of the Act, a notice served in terms of the Act, must contain the following:

"(5) The notice of proceedings contemplated in subsection (2) must-

- (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;*
- (b) indicate on what date and at what time the court will hear proceedings;*
- (c) set out the grounds for the proposed eviction; and*
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."*

[14] In my view, the termination notice contains more information than the information prescribed by the Act and consequently complies with the statutory requirements contained in section (4)(5)(a), (c) and (d).

[15] The notice does, however, not comply with section 4(5)(b), in that it does not indicate the date and time on which the application for the first respondent's eviction will be heard.

[16] In order to determine whether the notice is still effective notice as contemplated in section 4(2), the circumstances relevant to the first respondent's actual knowledge of the intended eviction application is relevant.

RELEVANT CIRCUMSTANCES:

[17] The termination notice was proceeded by a letter from the applicant's attorney, Geyser Attorneys, dated 2 February 2010, addressed to Mbethe Attorneys, who represented the first respondent at the time. I pause to mention that Mbethe Attorneys also represent the first respondent in these proceedings.

[18] The letter informs the first respondent that the applicant became the registered owner of the property on 7 January 2010 and that the first respondent must vacate the property by no later than 28 February 2010. Furthermore and should the demand not be adhered to, the applicant will launch a formal application for the first respondent's eviction.

[19] On 24 February 2010, Mbethe Attorneys responded to the aforesaid letter by contending that the property belongs to the deceased estate of A C K L Joubert. In the result and according to the first respondent, the transfer of the property to the applicant is *void ab initio*. The eviction issue was not

specifically addressed, but it is clear from the contents of the letter that the first respondent had no intention to vacate the property.

[20] The first respondent's contention in this regard was, once again, confirmed in a letter addressed by Mbethe Attorneys to Geyser Attorneys on 9 March 2010.

[21] In the premises and on 30 June 2010, when the termination notice was served on the first respondent, the first respondent did not only have prior knowledge of the applicant's intention to evict him, but also had legal representation.

[22] This application was served on the first respondent on 14 January 2011 and as alluded to earlier, the first respondent filed a comprehensive answer thereto.

[23] The merits of the matter was, furthermore, fully canvassed at the hearing of the application.

SUBSTANTIAL COMPLIANCE / EFFECTIVE NOTICE:

[24] In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 SCA, Brand AJA held that the procedural requirements

of s 4(1)-(5) are peremptory. The court, however, also had regard to the purpose of section 4(2) and stated the following at 1229 E -F:

"Accordingly the purpose of s 4(2) is clearly to afford the respondents in eviction proceedings a better opportunity than they would have under the Rules to put all the circumstances that they allege to be relevant before the court."

- [25] Mr Vorster drew my attention to the judgment in *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 SCA, where Brand JA stated the following at para [22]:

"As the appellants also correctly pointed out, it was held in Cape Killarney Property (at 1227E- F) that the requirements of s 4(2) must be regarded as peremptory. Nevertheless, it is clear from the authorities that even where formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved.."

- [26] In the *Unlawful Occupiers, School Site* matter, the respondent did comply with the provisions of section 4(2). The problem, however, arose with the contents of the notice, in that the notice did not deal with the requirements contained in subsection (a) and (c) of section 4(5) of the Act. Having had

regard to the events preceding the service of the section 4(2) notices, the court held that there was, in the particular circumstances of the matter, substantial compliance with the provisions of section 4(5). [Para 24]

- [27] With reference to *Unlawful Occupiers, School Site* matter, Streicher JA stated the following in *Moela v Shoniwe* 2005 (4) SA 357 SCA, at para [9]:

"Here the contents and manner of service of the notice had not been authorised and directed by an order of court. However, the object of s 4(2) is clearly to ensure that the unlawful occupier and municipality are fully aware of the proceedings and that the unlawful occupier is aware of his rights referred to in s 4(5)(d). It may well be that that object, in appropriate circumstances, may be achieved notwithstanding the fact that service of the notice required by s4 (2) had not been authorised by the court. That may, for example be the case if at the hearing it is clear that written and effective notice of the proceedings containing the information required in terms of s 4(5) had in fact been served on the unlawful occupier and municipality 14 days before the hearing."

- [25] Although the facts in the *Moela* matter are similar to the facts herein, the observation *supra* was made *obiter* and the court held that it was not necessary to decide the issue on the facts before them.

- [26] The issue of substantial compliance with the provisions of the Act was once again dealt with by the Supreme Court of Appeal in *Theart and Another v Minnaar NO; Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 SCA. Bosielo JA held as follows at para [14]:

"Viewed against the main purpose of PIE, the real issue is not so much whether or not there are two separate notices. The real and proper enquiry should be whether there has been effective notice of the proceedings on the occupier in the sense that a court is satisfied that the occupier has been fully informed of the impending eviction, the grounds therefor, the date and place of hearing, and the right to appear in court and be represented. This is exactly what happened in the two appeals. Accordingly I am satisfied that effective notice was given to the appellants. To hold otherwise would promote slavish adherence to form above substance."

- [22] The applications in the *Theart* matter emanated from the Magistrates'

court and the issue on appeal was whether section 4(2) requires that two

separate notices be served on an occupier. [*Also see: Minister of Safety and Security v Moodley* [2011] 4 All SA 47 SCA]

- [23] In the present matter, the first respondent obtained knowledge of the applicant's intention to evict him on or about 2 February 2010. If one have regard to the contents of the two letters written on his behalf by his

attorney, it is clear that the first respondent, upon gaining knowledge of the threatened eviction, received the necessary legal advice.

[24] If the first respondent was still in doubt as to his rights, the termination notice made it patently clear what his rights were.

[25] The fact that the first respondent had more than ample time to consider his position, is further borne out by the contents of the opposing affidavit.

[26] As stated *supra*, heads of argument was filed on behalf of the first respondent and he was duly represented at the hearing of this matter.

[27] In the circumstances and although the termination notice was not authorised by a court order, I find that the applicant had substantially complied with the procedural requirements contained in section 4(2) of the Act.

MERTIS:

[28] I now turn to the merits of the applicant's application.

[29] The fact that the applicant is the registered owner of the property is not in dispute. The applicant purchased the property from Anne-Marie Ford in terms of a written agreement of sale concluded on 20 April 2009.

[30] The events preceding the acquisition of the property by Ms Ford, is somewhat unfortunate and forms the basis of the first respondent's defence to the relief claimed by the applicant herein.

[31] The events was triggered by a loan agreement between Ms Ford and her spouse as the lenders and a certain Ms Joubert and her husband as the borrowers. Ms Joubert passed away on 12 February 2006 and I will refer to her herein after as the deceased. I pause to mention that the Jouberts were, at the time of the loan agreement, the registered owners of the property.

[32] The Jouberts did not honour their payment obligations in terms of the loan agreement and Ms Ford instituted an action for the recovery of the outstanding amount.

[33] On 25 March 2003 default judgment was granted in favour of Ms Ford. In terms of the judgment the Jouberts had to pay an amount of R 67 700, 00 together with interests and costs to Ms Ford.

[34] Apparently the Jouberts did not satisfy the judgment debt which led to the property being sold in execution by the Sheriff to Ms Ford.

[35] On 27 October 2003, Ms Ford sold the property to the first respondent. The following terms of the written agreement between Ms Ford and the first respondent is relevant:

"1) THE PURCHASER SHALL PAY THE AMOUNT OF R 20 000, 00
IN CASH DIRECT TO SELLER, NOT LATER THAN AT 28 - 10 -
2003 12H00 A.M.

2)

3) SHOULD THE PURCHASER NOT PERFORM BY SET PERIOD

THIS CONTRACT WILL BE NULL AND VOID AND THERE SHALL
BE NO FURTHER ARRANGEMENTS MADE."

[36] The first respondent only paid the amount of R 20 000, 00 on 29 October 2003. As a result of the late payment, the contract between the first respondent and Ms Ford was null and void and had no further legal effect.

[37] Notwithstanding the aforesaid, the first respondent did made some payments in terms of the "agreement" to Ms Ford. The property was, however, never transferred into the first respondent's name.

[38] In the meantime and on 26 May 2004, the default judgment against the deceased was set aside. At the time, the transfer of the property into the name of Ms Ford had not been effected and the property, should have reverted back to the estate of the deceased.

[39] Ms Ford has to date not proceeded with the action and the action is still pending in the Witbank Magistrates' court.

[40] Although the judgment underlying the sale in execution was set aside, deceased did not apply to have the sale in execution set aside. Consequently and on 7 January 2010, the property was transferred by the Sheriff into the name of Ms Ford and thereafter into the name of the applicant.

[41] It is clear from the aforesaid facts that Ms Ford, at the time of the transfer of the property to the applicant, had the necessary intention to pass ownership to the applicant and that the applicant had the intention to acquire ownership.

[42] In South African Law the abstract system for the transfer of ownership is applied and all that is needed for a valid transfer is the intention of the parties to pass and acquire ownership.

[43] Even if the transfer of the property into the name of Ms Ford was tainted, it is of no legal consequence to the transfer of the property into the name of the applicant.

[44] This much was confirmed by the Appellate Division in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 at 441:

"From the passage it is clear, I think, that a wide meaning must be given to the words 'iusta causa' or 'causa habilis' (Voët 41.1.35) and that all that these words mean in the context I am considering, is that the legal transaction preceding the traditio may be evidence of an intention to pass and acquire ownership. But there may be direct evidence of an intention to pass and acquire ownership and, if there is, there is no need to rely on a preceding legal transaction in order to show that ownership has, as a fact, passed."

[45] The legal position set out *supra*, has been followed in various decisions.

More particularly and with reference to the passing of ownership in immovable property, Stafford J held In *Brits and Another v Eaton NO and Others* 1984 (4) SA 728 T, at p 735H as follows:

"This lends further support to Mr Goldstein's argument that ownership in the said properties on the facts of this case passed to the company on transfer. After reviewing the authorities I am of the view that despite the void agreement, ownership in the properties passed to the said company and that was the position when liquidation took place."

[46] In the aforesaid matter, the seller had the necessary intention to pass ownership and the purchaser had the intention to acquire ownership.

[47] In the premises, the first respondent has not put any facts before me that justifies this continued occupation of the property.

ORDER:

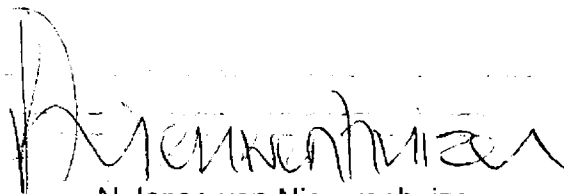
[48] In considering a just and fair order, the time afforded to the first respondent to vacate the property should be borne in mind.

In the premises, I make the following order:

1. The first respondent is ordered to vacate the property known as Portion 72 (a portion of portion 14) of the farm Leeuwpoort 283, Registration Division J.S., Province Mpumalanga ("the property") within 14 days from the date of this order.

2. Should the first respondent fail to vacate the property in terms of paragraph 1 of this order, the Sheriff of the above Honourable Court is authorised to do everything necessary to evict the first respondent and all other persons who occupy or hold possession of the property through him.

3. The first respondent is ordered to pay the costs of the application.


N Janse van Nieuwenhuizen

Acting Judge of the North Gauteng High Court, South Africa

Representation for the Plaintiff/Respondent

Instructed by: Mbethe Attorneys
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