

/EVDM

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

Case Number: 28458/2009
Date: 11/11/2009

UNREPORTABLE

In the matter between:

KATHLEEN MILLS

APPLICANT

VS

BREM SHAW

1ST RESPONDENT

THE EMAKHAZENI LOCAL MUNICIPALITY

2ND RESPONDENT

**THE UNLAWFUL OCCUPANTS ON PORTION 3 OF
THE FARM MOEILYKHEID**

FUTHER RESPONDENTS

JUDGMENT

Heard on: 02 November 2009

Delivered on: 11 November 2009

BAM AJ,

Introduction;

- § 1. The applicant applies for the eviction of the first respondent and “further respondents” from the immovable property of the applicant.
- § 2. The application is brought based on the *rie vindicatio* in conjunction with provisions of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE).
- § 3. It was common cause that the first respondent was the step son of HERBERT MLANZI and son of EVELYN SHAW. The aforesaid persons passed away respectively on the 7th of July 2008 and 11th of November 2008.
- § 4. It was further common cause that since 1984 the deceased were residents on the farm MOEILYKHEID, 129 JT, Belfast, Mpumalanga now belonging to the applicant.
- § 5. The applicant claims that nobody else but the afore deceased persons was entitled to occupy their residence on the said farm at all relevant times.
- § 6. The first respondent averred that he was entitled to occupy the said farm on the following basis,
- § 6.i In terms of the provision of the Land Reform Act (labour tenant) Act 3 of 1996 on the basis that he is a labour tenant per definition.

§ 6.ii That in terms of the foresaid act that he was also appointed as successor of the deceased in accordance with the provision of section 3(4) & (5) of the Act.

§ 7 A dispute of facts exists between the parties regarding the question whether the first respondent in fact resided with the deceased persons on the said farm since the year 1984, according to his version, or whether he never resided on the farm at any time according to the version of the applicant but that he started to attend to the matters regarding his mother's belongings after the date of her death on 21 November 2008.

Consideration regarding the facts;

§ 8 Before attending to the question of law raised by the parties and the points *in limine* referred to by the first respondent, I regard it as important and compulsory to determine and find on the probabilities exactly what the facts are.

§ 9 I am of the opinion that the probabilities regarding the first question referred to above, whether the first Respondent resided on the farm since 1984 favour the applicant on the following grounds:

§ 10.1 Apart from the respondent's allegation that he grew up on the farm there is no indication of whatsoever nature what he did on the farm or whether he was else where employed. There is also no indication on record that his name or any reference to him as a person are referred

to in any document; the only reference to family members of the deceased is a reference to grand children who visited the deceased, and who were permitted to do so, during school holidays.

§ 10.2 In this regard Mr Barnard, appearing for the first Respondent referred me to the agreement on page 46 of the papers, sub paragraph 2 thereof where reference was made as follows “the grandchildren will be fetched in the event of Herbert’s death.” Mr. Barnard’s submission in this regard was that this clearly indicated that grandchildren resided on the farm. Mr Scheepers for the applicant pointed out that if the first respondent in fact resided on the farm as he claimed, it is remarkable that no reference is even made of his presence on the farm on the document that I quoted from.

§ 10.3 What I further find of importance is a lack of detail in the first respondent’s version regarding his alleged time of residence on the farm in view of *alter alia* his age. In view of the fact that the reference has been made to the grandchildren one can safely assume that on the probabilities the first respondent was already an adult in 1984. One would have expected the first respondent, in the circumstances, to elaborate about his personal circumstances including his marital status, and children if any, and particulars of his employment.

§ 11 In view of the aforesaid I have come to the conclusion that the first respondent's version of his residence on the farm since 1984 can safely be rejected.

§ 12 In the replication of the applicant further confirmatory evidential material was filed supporting the applicant's version regarding the above mentioned issue. Even if the replication contains "new evidence", that should not have been allowed, I am still of the opinion on the remaining facts that applicants version is to be accepted.

Points in limine of the first Respondent;

§ 13 The first point *in limine* taken by the first respondent refers to the citation of "further respondents"; apparently referring to "other" unlawful occupants on the farm. In this regard Mr. Barnard referred me to the authority **Dries vs Venter NO and others 2005 (6) SA 67 (T)** where it was held that an eviction order can not be granted against any person who has not been properly notified in terms of the Act. From the papers it appears that the only other person who may come into play is the brother of the first respondent, Mr. MOKOENA who filed a confirmatory affidavit (p30 & 31 on the papers).

§ 14 In the circumstances it accordingly appears to me that the afore said GEORGE was aware of the application and that Mr. Barnard's argument in that regard should not be upheld.

- § 15 The second point *in limine* taken by the first respondent turns about the jurisdiction of this court. According to the argument the first respondent based his right of occupation on the provision of the Land Reform Act, Act 3 of 1996. It was submitted that the first respondent is in fact a “labour tenant” as defined in section 1 of the said Act. It was further submitted that any labour tenant may only be evicted in terms of an order of court, being the Land Claims Court instituted by Section 22 of the Restitution of Land Right Act of 1994, Act 22 of 1994.
- § 16 Accordingly it was submitted that in view of the dispute between the parties, which required and interpretation of the said Act, and where no oral evidence was adduced, the case must be transferred to the Land Claims Court for adjudication by that Court.
- § 17 In developing his argument in this regard Mr Barnard referred to the definition of the “labour tenant” in section 1 of the Land Reform Act.
- § 18 Mr. Barnard further referred the court to several authorities regarding the interpretation of “labour tenant”.
- § 19 I am of the opinion that in view of the version of the applicant regarding the basis of the residence on the farm of the deceased which I have already explained, that the first respondent does not fall within the ambit of the definition of a labour tenant. That includes my finding that

the first respondents late step father also did not fall within the definition of a “labour tenant”.

§ 20 Mr. Barnard further submitted that the first respondent was appointed as successor of his late step father in terms of the provisions of section 3(4) & (5) of the Act.

§ 21 The first respondent stated in his apposing affidavit that he was appointed successor of his late step father. According to Mr. Barnard the first respondent’s situation is covered by the Provisions of Sections 3(4) and (5) to which I have referred above.

§ 22 In view of my finding above, which includes that the first respondent in fact only attended to the negotiation regarding the removal of the belongings of his deceased mother from the farm after her death, I am of the opinion that there is no indication whatsoever on record from which I can infer that the first respondent was in fact the appointed successor.

§ 23 The aforesaid findings to which I have referred to, further included that the first respondent is not a ‘labour tenant’ in terms of the Act.

§ 24 The third point *in limine* taken by Mr. Barnard turns about the question of what a case, if any, the applicant made out in his founding papers. In this regard I’ve all ready referred to my finding that regarding the merits

of the matter the probabilities favour the applicant, even if what is contained in the replication is not considered.

§ 25 Mr. Scheepers for the applicant submitted that in terms of PIE the first respondent is an unlawful occupier which is defined as follows: “A person, who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land , excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997 and excluding a person whose informal right to land, but for the provision of the Interim Protection of Informal Land Rights Act (131 of 1996)”. I agree with this submission

Conclusion;

§ 26 I am satisfied that the first respondents point *in limine* should be rejected.

§ 27 I find that this court has in fact jurisdiction to adjudicate the application.

§ 28 Accordingly I find that the applicant should succeed with her application for the eviction of the first respondent and any other unlawful occupants on the said farm and I make the following order:

§ 28.1 An order for the eviction of the first and further respondents, and all those occupying through them, from Portion 3 of the Farm MOEILYKHEID 129 JT, Belfast, Mpumalanga.

§ 28.2 An order directing the first and further respondents and all those occupying through them to vacate the property within 14 days from the date of this order.

§ 28.3 If the respondents have not vacated the property after the expiry of the 14 days supra, the sheriff shall be authorized and required to carry out the eviction by removing, the respondents and their property and/any other unlawful occupants occupying through him.

§ 28.4 Cost of this application to be paid by the first respondent.

A. B. BAM

Acting Judge of the High Court

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