

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case Nr: 905/2007

Case Heard: 22/05/2009

Judgment delivered: 22/05/09

Reasons supplied : 08/07/2009

In the matter between:

Umsobomvu Municipality

APPLICANT

and

Blenkie Maartins

RESPONDENT

Coram: Henriques AJ

REASONS FOR JUDGMENT

Henriques AJ:

1. This matter served before me in the opposed motion court on 22 May 2009. On the morning of the hearing, the respondent's counsel, Adv van Tonder, informed me that he sought leave to withdraw as counsel. After considering his application and the submissions of Mr Motlounq who appeared for the applicant, I subsequently granted him leave to withdraw as I was satisfied that the correspondent attorney was aware of the date for the hearing of the application.

2. After hearing the argument of the Applicant's Counsel, Mr Motlounge, I dismissed the application with costs including the costs occasioned on 9 May 2009.
3. Subsequently on Friday, 26 June 2009 I received this file. The file had been handed to my secretary by the Registrar and she was advised that an application for reasons in terms of Rule 49 (1)(c) had been served and filed on the registrar's office on 4 June 2009.
4. The request for reasons was not brought to my attention prior to 26 June 2009, and the notice was merely placed in the file and filed away.
5. On receipt of the file, on 26 June 2009, I requested a transcript of the proceedings and this was provided to me on 2 July 2009.

THE APPLICATION:

6. The applicant issued papers on 30 July 2007 in which it sought an order in the following terms:-
 1. *"That the respondent be ordered forthwith to vacate the properties known as Camp K11, W17 & E13, which form part of the remainder of Erf 675 issued under Title Deed T1414/1963, Colesburg.*
 2. *In the event of the respondent failing to comply with paragraph 1 (one) above, the sheriff, Colesburg is empowered and instructed to enter onto the properties, and forcibly evict the respondent, as well as any person claiming occupation through him, from the properties.*

3. *That the respondent be ordered to pay the costs of the application.”*
7. In the founding affidavit deposed to by its municipal manager, the applicant alleged as follows:-
 - 7.1. That it was the registered owner of property T1414/1963 which was the remainder of Erf 675. In support of this allegation the applicant attached the cover page of the Deed of Transfer as annexure ACM2 which merely referred to the title deed number. No reference on annexure ACM2 was made to the Erf or the camps referred to in paragraph 1 of the notice of motion. The applicant did indicate that the entire document was available for inspection.
 - 7.2. In 2003 it had established a dialogue with small farmers as it intended to assist emerging/small farmers to utilize municipal commonages. As a result a resolution was passed which allowed different farmers to use the camps for their livestock. Reference to this is to be found in annexure ACM11. Annexure ACM11 on page 30 of the papers refers to the availability of commonage camps and indicates which camps fell into which particular groups and which were allocated to the various type of farmers. No mention is made of Erf 675 on this document. It is also apparent that the camps which the Respondent used were designated for emerging farmers and the Kalahari kid project. He did **not** occupy the camps designated for commercial farmers.

- 7.3. The applicant also encouraged emerging farmers to establish an association, which they did, to ensure that there was uniformity in respect of the application of benefits to farmers. Farmers were also required to sign lease agreements.
- 7.4. When the emerging farmers failed to pay their dues, the applicant then resolved to enter into agreements with individual small farmers under their association name. The emerging farmers were advised that in order to gain access to camps they had to comply with certain requirements. These requirements were the following:
- 7.4.1. a lease agreement must be signed;
 - 7.4.2. produce proof of identification; and
 - 7.4.3. agree on a lease amount payable.
- 7.5. The applicant further alleges that in September 2004 the respondent had brought his cattle to camp W17 but refused to be part of the association. The Applicant does not state whether the Respondent occupied with or without its consent.
- 7.6. The respondent appears to have approached the applicant's manager for strategic planning and administration, Jacobus Kapp, to tender for land at various times including in September 2005. He was informed that land was only made available to

members of emerging/small farmer's association and that he should join an association.

- 7.7. Subsequently, the Respondent sent a letter to the applicant on 7 February 2007 in which he tendered for camps W17, K11 and E13 through his attorneys C J Bower. He also made mention of the fact that his infrastructure and livestock were on the camps.
- 7.8. The applicant's response by way of letters dated 9 February, ACM6 and 2 March 2007, ACM7, was to inform the Respondent of its decision to allocate the camps to the Small Farmers Association and that it was in the process of concluding contracts with individual farmers in terms of which they would have rights of occupation. The letter further advised the Respondent that his occupation of the camps meant that the camps could not be used and that he was refusing them access. He was advised that his occupation was unlawful and was once again advised to join a small farmer's association in order to be eligible for allocation of camps.
- 7.9. The respondent through his attorneys by way of a further letter dated 28 March 2007, advised the applicant that he was not obliged to join the small farmers association, would not vacate the camps and wanted a tender for the camps he occupied.
- 7.10. Kapp confirms by way of an affidavit commissioned on 1 August 2007, a day after the papers were issued, his interactions with the Respondent. (I may add that the papers do not contain any details

relating to the occasions that the respondent had tendered for the land).

- 7.11. The applicant indicates that the Respondent's occupation of the camps is unlawful and denies it the full use of the said property.
8. In opposing the application for his eviction the respondent raises the following:-
 - 8.1. he challenged the validity of the resolution authorising the Municipal Manager to depose to the founding affidavit;
 - 8.2. he alleges that he has no personal knowledge of the Applicant's ownership of the property but does not dispute same but goes on to allege that ACM2 is meaningless;
 - 8.3. the locus standi of the applicant to bring these proceedings in that the applicant had not established that it was the owner of the property;
 - 8.4. the founding papers are not clear in relation to the leasing of the commonages; they do not stipulate when these commonages were first leased and to whom;
 - 8.5. the non joinder of Thembinkosi Lennox Mbegezi;
 - 8.6. he has been farming on the land since 1993 in terms of an agreement with the applicant. Such agreement

terminated and he has remained on the land throughout;

- 8.7. he confirms that he refuses to be part of an association and has been more than willing to enter a proper lease agreement with the applicant for the lease of the land for farming purposes;
- 8.8. he farms with eighty head of cattle with his son.
9. In reply the applicant denies that the Respondent has been farming on the land since 1993 in terms of an agreement. It admits that there was a lease agreement in respect of the property which lapsed in 1996. Thereafter the property was leased on a month to month basis but such lease was not with the respondent. It further denies that there was ever a lease with the respondent in place which appears to suggest that the respondent occupied without consent. For the first time in reply, the Applicant alleges that the Respondent is a commercial farmer.

REASONS FOR JUDGMENT

1. It is trite that every applicant must set out in its founding affidavit the material allegations upon which it relies for the relief sought. An applicant will not be allowed to make out a case in reply when no case was made out in the founding papers. See **Erasmus Superior Court Practice and National Council of SPCA v Openshaw 2008(5) SA 339, page 349, paragraph 29.**
2. Our courts have held that in motion proceedings the affidavits constitute both the pleadings and evidenceand that the

issues and averments in support of the parties cases ought to appear clearly from the founding affidavit. See in this regard **Transnet v Rubenstein** 2006 (1) SA 591 SCA at page 600, **Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others** 2008 (2) SA 184 SCA at paragraph 44.

3. Rule 6 of the High Court Rules also provides that the facts upon which an applicant relies on, must be set out simply, clearly and in chronological sequence and without argumentative matter in the founding affidavit. An applicant's locus standi must be established in the founding affidavit and not in a replying affidavit.
4. In applications and or actions for eviction, the provisions of the Constitution and a number of statutes affect the right to eject an unlawful occupier of land and these must be taken considered when proceedings are instituted. The relevant statutes are inter alia, the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).
5. ESTA defines an occupier as 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, but excludes:
 - 5.1. a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who worked the land himself or herself and does not employ any person who is not a member of his or her family; and

- 5.2. a person who has an income in excess of the prescribed amount.
6. There is a presumption that the land occupied falls under the provisions of the Act, and an applicant for the eviction of an unlawful occupier, has to **allege** and **prove** that the Act does not apply. **See Amler's Precedent of Pleadings, 6th Edition, page 170.**
7. In terms of the judgment of Harms JA, in **Ndlovu v Ngcobo; Bekker and Another v Jika** 2003 (1) SA 113 SCA, page 120 at paragraph 6 "*ESTA protects persons who, at some stage or another, had consent or some other right to occupy (basically) agricultural land*".
8. PIE applies to the eviction of all unlawful occupiers meaning persons who occupy land without the express or tacit consent of the owner or person in charge or without any other right in law to do so. It does not apply to persons who are occupiers in terms of ESTA.
9. In my view in this matter the papers that were drafted lacked essential averments for the relief sought. In other words the applicant did not make out a case in its founding papers and Counsel who appeared sought to do so in argument.
10. The papers contain no allegations as to why the applicant was not required to comply either with ESTA or PIE.
11. In light of the presumption I have referred to earlier on, to my mind the applicant ought to have in its founding affidavit stipulated why it says ESTA and PIE does not apply. In the event of ESTA and PIE not applying, it ought to have made

these essential allegations in its founding affidavit confirming that the applicant does not fall within the parameters of either of these acts and thus excusing it from having to comply therewith.

12. From a reading of the papers it is not clear:-

12.1. when precisely the respondent took occupation of the land, whether this was with or without consent and when his right to occupy terminated;

12.2. whether he in fact resides on the property, and whether there are any building or structures;

12.3. whether he works the land himself and does not employ a person who is not a member of his or her family;

12.4. whether the respondent was a commercial farmer (I was not referred to any definition of a commercial farmer by the applicant and this allegation was raised for the first time in reply by the applicant);

13. Mr Motlounq who appeared for the applicant indicated that the applicant was relying on a vindicatory action and all that an applicant need allege and prove was its ownership of the movable or immovable property and that the respondent was in possession of the property at the time of the institution of an action. However, it is not as simple as that, as the right to vindicate has been curtailed by the constitution and the passing of legislation like ESTA and PIE.

14. During the course of argument I also gained the impression that the applicant was trying to remedy the problems it had

with its founding affidavit and the lack of essential averments. This is evident from a reading of the transcript. I refer to a few examples hereinbelow.

15. During the course of argument one of the issues I pertinently raised with Mr Motloun was whether or not the property which belonged to the applicant was designated for commercial farming purposes. Mr Motloun eventually conceded that it was not. (Page 6 of the transcript). This then begs the question as to how the respondent could then be considered to be a commercial farmer.
16. I also enquired from him whether consideration was given to PIE alternatively ESTA when the papers were drafted. His response was that the applicant had considered ESTA and PIE and found that the respondent would not be a person described in ESTA as he was a commercial farmer. If that was so, why were these allegations not made in the founding affidavit.
17. I then asked him as to why PIE did not apply. From a reading of the transcript it is clear that no satisfactory response was given. When he was asked as to why the respondent did not fall under the definition of an occupier he was of the view that the definition of PIE excluded an unlawful occupier. When I pointed out to him that PIE applies to an unlawful occupier his submission was that his reading of the Act says differently. When pressed by me he indicated that a person is an unlawful occupier of the land and is not a person who is protected under PIE in terms of section 1. In addition the cases referred to by Mr Motloun did not support his argument.
18. At the end of his argument, Mr Motloun requested an amendment to the initial relief sought in the notice of motion.

He indicated that the applicant was not occupying the property and therefore all he sought was an order evicting the cattle from the premises. This was not expressly stated in the founding affidavit and this was not the relief sought in the notice of motion. If that was the case there would have been no need for this application to have been brought in the first instance. It appears that this change of tack by the applicant was to circumvent the obligation of the applicant to discharge the onus that neither PIE nor ESTA applied. This appeared to be somewhat of an afterthought on the part of the applicant. If only the cattle of the respondent was on the premises why not simply have them removed by means of the assistance of the relevant pound master in the area. There would thus not be a need to obtain an order for the eviction of the respondent and/or all persons claiming occupation by through or under him if he was not occupying the premises.

19. Given the lack of necessary allegations in the founding papers I was thus constrained to dismiss the application.

COSTS

20. A perusal of the court file reveals the following in relation to costs. The matter appears to have been enrolled for hearing on 9 May 2008 on the opposed roll. On that date the matter was postponed *sine die* and the costs occasioned by the adjournment were reserved. This was pursuant to a formal application lodged by the Respondent for an adjournment. The matter was then enrolled for hearing on 5 December 2008 and was subsequently adjourned to 13 February 2009. On 13 February 2009 the matter was adjourned to the opposed roll for 22 May 2009 and the question of wasted costs was reserved for later determination.

21. When he addressed me on costs Mr Motlounng advised me that the only costs order that he sought was in respect of the costs which were reserved on 9 May 2008 (page 39 and 42 of the transcript). I had regard to the affidavit in support of the application for an adjournment on 9 May 2009 and the supplementary heads of Mr Motlounng in this regard. Having considered the reasons for the adjournment and having regard to the unwritten practice in this division that dates are normally arranged in consultation with both the applicant's and the respondent's attorneys and counsel, it was my considered view that the costs occasioned on 9 May ought to be paid by the applicant.
22. For the reasons I have mentioned above it was my view that in light of the fact that the applicant did not make out a proper case for the relief sought, costs ought to follow the result and it was for this reason that I ordered the applicant to pay the costs occasioned by the application.

J I HENRIQUES
ACTING JUDGE
NORTHERN CAPE DIVISION

For the Applicant:	Adv Motlounng
Instructed by:	DuToit - Bomela KIMBERLEY