IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: 1989/2024

In the matter between:

PRIMROSE NOSIPHO RUSELO **APPLICANT**

And

VUYANI PATRICK SOMYO **1ST RESPONDENT**

ALL OTHER PERSONS OCCUPYING **2ND RESPONDENT**

THE FARM THROUGH FIRST RESPONDENT **3RD RESPONDENT**

EASTERN CAPE INDUSTRIAL DEVELOPMENT

CORPORATION (IDC) NGUNI CATTLE

DEVELOPMENT TRUST

JUDGMENT

Nkele AJ:

INTRODUCTION.

[1] This is an application in which the applicant seeks an eviction order against the respondents from a property known as the Remainder of Farm 179, Komga

Registration Division, Province of the Eastern Cape and Remainder of Portion 3 Farm 180, Komga Registration Division, Province of the Eastern Cape. The applicant also seeks an order authorising the Sheriff of the above honourable court, duly assisted by the South African Police Service, to carry out the eviction should the 1st respondent, and all other persons occupying the farm through him, not have vacated the farm within 30 days of the date of the order directing them to so vacate, with all their movable possessions and livestock. The application is being opposed only by the 1st respondent, and he has filed opposing papers and heads of argument.

FACTUAL BACKGROUND UNDERPINNING THIS CASE.

[2] On or about the 4th of March 2019 the applicant concluded a 30-year long an Agricultural Agreement lease, with the Eastern Cape Department of Rural Development and Land Reform. The applicant, therefore, bases his locus standi to launch the present application on the lease agreement she entered into with the department**.**

[3] On or about the middle of 2014, after she took occupation of the Farm, the applicant applied to the department for subsidies and her application was referred to the 3rd respondent for consideration. She was one of the few female farming candidates who were identified to participate in a cattle loan scheme that was operated by the 3rd respondent. At the time the 3rd respondent had introduced a cattle loan scheme programme for emerging farmers which had, as its main object, the re-establishment of the Nguni cattle breed back in the Eastern Cape Province. Following thereto, and on or about November 2014, she was approached by the 1st respondent and learnt more about that cattle loan scheme. She then agreed to participate in the scheme, and 27 Nguni cattle were subsequently delivered to her farm. The arrangement was that she would have them for a period of 5 years.

[4] During or about March 2018 the applicant was approached by the 1st respondent when she requested her to assist the 3rd respondent by making some land available from the Farm for purposes of accommodating its cattle. At the time the cattle were kept at a farm belonging to the University of Fort Hare in Alice. The

idea was that if the cattle are kept at a farm in Komga it would be easier to make deliveries to farmers that are in and around the Great Kei region, as it is in close proximity to them, in terms of location.

[5] It is common cause, or at least indisputable, that the applicant and the 1st respondent entered into a verbal sub-lease agreement on or about November 2018 and the material terms thereof were that:

> *1.1.1 "The 1st respondent was to keep the cattle on a camp site situated on the farm for purposes of herding and grazing;*
>
> *1.1.2 the 1st respondent was to pay an amount a sum of R 3500.00 per month for the use of the farm as a contribution towards electricity; and*
>
> 1.1.3 *the sub-lease agreement was to endure until all the cattle on the farm had been delivered to the farmers around the Great Kei area".*[1]

[6] The verbal agreement that the parties concluded relating to the sub-lease of the farm proceeded harmoniously until such time that the 3rd respondent was de-registered in December 2020. That meant that the 1st respondent's employment as a Programme Manager had come to an end and he would have to take over the operations of the 3rd respondent. That which is the subject of dispute, between the applicant and the 1st respondent, is when was the latter required to vacate the farm by the former.

THE APPLICANT'S CASE

[7] The applicant bases her claim for the respondents' eviction from the farm firmly on the premise that she has the right to do so, as a tenant in a 30-year long agricultural agreement of lease with the department, which lease still endures in that it has not been terminated. According to her the farm was, in terms of the lease, let to her, and she has hired it, for purposes of conducting agricultural activities[2]and in consideration thereof she would pay rent in the sum of R 28 000.00 per year, which amount would escalate at the rate of 6% per annum. In terms of clause 6, she would be entitled to the following discounts as a category 3 lessee:

1.1.4 75% rental discount during the first year;

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[1] para 25 page 12.
[2]clauses 3 and 4 of the lease page 29.

1.1.5 50% discount during the second year; and

1.1.6 25% discount during the third year.

[8] It is the applicant's case that the reason for the respondents' occupation and presence at the farm was that the 3rd respondent's programme of providing emerging farmers with the Nguni cattle in the Greater Kei area was still in operation. In fact, the arrangement was meant for the sole purpose of facilitating easy access to the farmers in that area by having a camp in the farm which will be closer to the intended recipients of the scheme operated by the 3rd respondent. Now that the 3rd respondent has been de-registered and, effectively has ceased to exist, the reason for the 1st respondent's presence on the farm has fallen away, hence the applicant's demand that he vacates it.

[9] The applicant contends that when the 3rd respondent ceased to operate in December 2020, she indicated to the 1st respondent that she wanted to make use of the camp site that he was using and therefore required him to leave the farm. The reason why she wanted the respondents to vacate the farm, in addition to the de-registration of the 3rd respondent, was that the 1st respondent was in breach of the lease agreement in that he had started to sell the cattle directly from the farm. The latter reason, the applicant contends, was in breach of the terms of the sub-lease agreement. In effect, the applicant's assertion in this regard is that their agreement never entailed that the 1st respondent would carry his own private business on the farm.

[10] After the 1st respondent was required to vacate the farm, during or about November 2021, he informed the applicant that he would evacuate the farm at the end of January 2022 and move the cattle to his brother's farm in Adelaide. To signify that undertaking, the 1st respondent's last payment of the amount of **R 3500.00** was in November 2021. The 1st respondent failed to vacate the farm, as agreed in November 2021, and when the applicant questioned him as to when he will do so, he failed to give a definite answer. Instead, what followed was that he instituted legal proceedings in the Komga Magistrate Court in terms of the provisions of the Protection from Harassment Act[3]. Indeed, the applicant further contends, the

[3] section 3(2) of Act No. 17 of 2011.

institution of the harassment proceedings was a ploy on the part of the 1st respondent to frustrate and delay the applicant in the process of evicting him from the farm and, at the same he sought to deflect attention from his illegal business of selling livestock from the farm, in breach of the verbal sub-lease agreement.

[11] It is the applicant's contention that, despite numerous and repeated requests, the 1st respondent failed to vacate the farm. To this end the applicant even went to the extent of engaging the services of legal representatives who gave him a formal written notice to vacate dated 6 June 2023. The 1st respondent was not even moved by that formal written notice to evacuate the farm. What he did was to enlist the services of his own legal representatives who, on the 9th of June 2023, only acknowledged receipt of the written demand to vacate. That prompted the applicant's legal representatives to address another letter to his legal representatives, dated 27 July 2023, which enquired as to when he intends to vacate the farm; whether he intends to negotiate exit terms; and whether he intends to oppose the proposed eviction application.

[12] In a response dated 11 July 2023, the 1st respondent noted the applicant's intention to reassume occupation of the farm under the lease agreement but requested her to understand the potential impact that the eviction would have on the livestock. He therefore requested her cooperation for purpose of the welfare of his pregnant livestock and the financial viability of his farming business. He therefore requested a period of 3 and half years as, according to him, there were no suitable farms available for purposes of accommodating his livestock. His reason for requesting such a long period was that it would take such a long period of time for the livestock to complete the gestation periods and that if the vacation of the farm were to be immediate it would have an adverse impact on the true value that he would otherwise realise from the livestock.

[13] The respondent's counteroffer in this regard was rejected in its entirety by the department per letter dated 18 July 2023. The applicant strongly contends that the basis of her eviction application is the common law, and the letter dated 18 July 2023, headed as a notice in terms of the ESTA, was written under the wrong and mistaken impression that the proceedings would be instituted under the provisions of

that Act. She has since been advised that the provisions of that Act are inapplicable in the present factual scenario and that the present proceedings are governed by the common law.

[14] Lastly, it is the applicant's vehement and strong assertion that any right that the 1st respondent may have had has long been terminated and his continued stay and occupation of the farm is downright unlawful. The applicant therefore urges the court to consider the fact that every attempt to persuade the 1st respondent to voluntarily vacate the farm has failed, and that the present proceedings have been instituted as a last resort and grant the eviction order on that basis.

1ST RESPONDENT'S CASE

[15] In opposition, the 1st respondent raises a point in limine of lack of locus standi on the part of the applicant. To substantiate that point, the 1st respondent contends, with so much vigour and determination, that from the applicant's own papers it is quite apparent that from December 2021 she has been employed as Councillor and that she was married to an individual who was employed by the Amatole District Municipality. After that marriage came to an end, she became involved in an intimate relationship with someone in the employment of the Great Kei Municipality.

[16] The applicant asserts that the applicant's employment as Councillor and her relationship with people who are in the employment of the state is in breach of the provisions of clause 28 of the lease agreement the applicant concluded with the department. Clause 28 of that lease agreement provides that:

> *"28.1.1 If the lessee or lessee's spouse or common law partner is employed by the State as a public servant at any time during the lease;*
>
> *28.1.4 Any unauthorized subletting or cession of the lease agreement on the part of the lessee shall constitute grounds for immediate termination of the lease agreement, without any notification period to remedy the breach."*

[17] In this regard the 1st respondent strongly contends the fact that the applicant subleased the farm to him and also that they had a tentative agreement to have her rights thereto ceded to him, once she becomes Councillor, was a clear demonstration that she was in breach of clause 28 of the lease agreement. For that reason, the 1st respondent further contends, the lease terminated automatically in terms of clause 28 of the lease agreement, hence the assertion that she has no locus standi to institute the present eviction proceedings against him. The 1st respondent further elaborates on this point by stating that as a consequence of the instances of breach aforesaid the lease, in the circumstances, was terminated the moment they were committed. To add salt to the already gaping wound, the applicant was married to a public servant, an employee of the Amathole District Municipality, and that constituted a material breach in terms of clause 28.1.1 of the lease which rendered void ab initio and caused it to terminate automatically.

[18] In conclusion, on the point in limine of locus standi, the 1st respondent contends that it is only the department that has the requisite authority and legal standing to bring eviction proceeding against him, not the applicant. For that reason, so the 1st respondent contends, the application should be dismissed with costs, on that ground alone. The gist of the 1st respondent defence is that she has no right or authority to evict him from the farm and only the department can do so. Furthermore, the 1st respondent strongly disputes that his occupation of the farm, or by anyone who is there at his instance, is illegal and therefore it is wrong of the applicant to make them illegal occupants.

[19] The 1st respondent relies on the fact that the applicant had been away from the farm since December 2018 and therefore argues that he has been, since then, in peaceful and undisturbed possession of the farm. He further contents that the lease agreement was signed in March 2019, so the 1st respondent contends, so when the applicant left the farm the agreement that gives her a right to be in lawful possession of the farm was concluded. Furthermore, when the lease agreement was entered into the applicant promised to communicate it to the department so that in the end, when she had been appointed as a Councillor, the rights that she had in terms of the lease could be ceded to him. However, the applicant reneged from that agreement

and, instead betrayed him by concluding a cession agreement with one Mr Moko on 10 August 2022.

[20] In conclusion, the 1st respondent vehemently asserts that the applicant has acted in a disingenuous and deplorable manner by repudiating their agreement to cede her rights to him and that, in the circumstances, if an eviction were to be granted it would be tantamount to an encroachment on the sanctity of the sublease they have entered with the applicant. In this regard the 1st respondent contends, with much vigour, that it would be a grave miscarriage of justice if the applicant were to be permitted to act in terms of a lease agreement that has been terminated by *lex commissaria*. In the circumstances the 1st respondent prays for dismissal of the application with costs.

THE PERTINENT LEGAL PRINCIPLES

[21] By definition, a lease agreement is a contract in terms of which one party, otherwise known as the lessor, agrees to give temporary use and enjoyment of his property to the other, the lessee, in return for payment of a rent[4] to enter into an agreement of lease which will result in the temporary use and enjoyment of the property of the lessor by the lessee[5], it is trite that in the event of a dispute as to the true nature and identity of the contract that the parties have concluded the courts look at the main intention of the parties, and not the name or label that they give to their agreement.[6]

[22] As far back as 1927 the Appellate Division of the then Supreme Court of South Africa authoritatively stated that "*If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the*

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[4] Graham Glover Kerr's Law of Salse and Lease LexisNexis 4th Ed page 329, Francois du Bois et al Willie's Principles of South African Law Juta 9th Ed page 907, Genac Properties JHB (Pty) Ltd v NBC Administrators CC 1992 (1) SA 566 (A) 576D-E.

[5] Glover ibid page 333.

[6] Oosthuizen v Standard Credit Solution Ltd 1993 (SA 891 (A) 911H-912B; ERF 3183/1 Lady Smith 9Pty) Ltd v Commissioner for Inland Revenue 1996 (3) SA 942 (A) at 953; Ferndale Crossroads Share Block (Pty) Ltd v Johannesburg Metropolitan Municipality 2011 (1) SA 24 (SCA) at paras 12-20.

courts of justice.[7]*That is a doctrine of privity and sanctity of contract which entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into consideration the requirements of a valid contract, freedom to contract denotes that the parties are free to enter into contracts and decide on the terms of the contract."*[8] Quite recently the apex court in *Beadica 231 and others v Trustees for the Time Being of Oregon Trust and Others*[9] lucidly narrated this salient principle of our law, otherwise known as pacta sunt servanda in the following terms:

> *"Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed."* [10]

[23] The court continued at paragraph 85 as follows *"The fulfilment of many of the rights and promises made by the Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed., our constitutional project will be imperilled if courts denude the principle of pacta sunt servanda."* According to **RH Christie and GB Bradfield** the basic idea of a contract is that parties must be bound by the contracts they make with each other and it would be ridiculous if total strangers could sue or be sued on contracts with which they were in no way connected. The doctrine which prevents this ridiculous situation from arising is usually known as the doctrine of privity of a contract. That essentially means parties who are not privy to a contract cannot sue or be sued on it.[11]

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[7] Wells v South African Aluminite Company 1927 AD 69 at 73.

[8] Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176 (1 December 2017) para 23, S v S and Others (59502/2022) (2022) ZAGPJHC (12 January 2022) para 13.

[9] (CCT 10919) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 () BCLR1098(CC) 17 June 2020.

[10] para 84 of the judgment.

[11] Christie's the Law of Contract in South Africa LexisNexis 6th Ed page 269.

[24] It is a generally accepted principle that the right to rescind a contract, in the event of breach by a guilty party, is an extraordinary one reserved only to the innocent party in special circumstances. [12]The innocent party is not obliged to exercise the right to rescind, he or she at his or her option.[13] It is entirely dependent upon the innocent party to waive his or her right of rescission, either expressly or impliedly. That happens if the innocent party with full knowledge of the existence of the right [14] he or she abandons it, either expressly or tacitly by conduct plainly inconsistent with the intention to enforce it.[15] The test to determine the innocent party's intention is purely objective and the following factors are taken into account; namely: the outward manifestation of intention; [16]mental reservations, not communicated, being ignored[17].

[25] In *Bekezaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd Friedman JP* observed as follows "*If the act on which it is sought to rely for the exercise of an election is not unequivocal, regard may be had to the subjective considerations which motivated the party concerned in order to determine whether the act in question does in fact constitute an election or not."*[18]. Overall, the fundamental question that has to be answered is whether a reasonable person in the position of the other party would have concluded [19] that the innocent party knew that he or she had the right to rescind and intended either to relinquish the right or affirm the contract.[20] The innocent party cannot both approbate and reprobate[21].

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[12] LAWSA Vol 9 para 423 page 321.
[13] LAWSA Vol 9 para 423 page 322, Myers v Abrahamson [1952] 1 All SA 267 (C); 1952 (3) SA 121 (C) 123.
[14] LAWSA Vol 9 para 424 page 322, Road Accident Fund v Mothupi [2000] 3 All SA 181 (SCA); 2000 (4) SA 38 (SCA) paras 17 – 21.
[15] Sewpersadh v Dookie [2008] 1 All SA 286 (D); 2008 (2SA 526 (D) para 23; Spheris v Flamingo Sweet (Pty) Ltd (2008) 1 SA 304 (W), 2008 (4) SA 304 (W) 309, Sewpersadh v Dookie [2009] 4 All SA 338 (SCA), 2009 (6) SA 611 (SCA) para 16.
[16]Botha (now Griessel v Finans credit (Pty) Ltd [1989] 2 All SA 401 (A); 1989 (3) SA 773 (A) 792; Road Accident Fund v Mothupi supra para 49, LAWSA Vol 9 para 424 page 322)
[17] LAWSA Vol 9 para 424 page 322.
[18] 1996 (2) SA 537 (C) 544.
[19]Southern Witwatersrand Exploration Co v Bisich Mining plc [1997] 3 All SA 691 (W); 1998 (4) SA 767 (W) 778-780.
[20] ABSA Bank Ltd v Master of the Supreme Court Natal Provincial Division [1998] 3 All SA 189 (N) 200-203; 1998 (4) SA 15 (N).
[21] Schalkwyk v Griesel [1948] 1 All SA 492 (A); 1948 (1) SA 460 (A) 473; Moyce v Estate Late Taylor [1948] 3 All SA 523 (A); 1948 (3) SA 822 (A) 829; LAWSA Vol 9 para 424 fn 8 page 324.

ISSUE FOR DETERMINATION/TO BE DECIDED

[26] In my considered view, the crisp issue that has to be decided in this matter is whether the applicant has the necessary locus standi and the authority to launch the present application proceedings in terms of the lease agreement. In the event that it is demonstrated that the applicant has the necessary locus standi, and in that event alone, then it will be necessary to consider which regime regulates the eviction proceedings, ESTA or the common law. Lastly, the appropriateness and legal validity of the 1st respondent's defence will be considered as well as the question of costs.

ANALYSIS AND EVALUATION

[27] In an endeavour to demonstrate that she has the locus standi and the necessary legal standing to launch the present application, the applicant states quite clearly in her founding papers that she is a lessee in a 30-year long lease with the department which was signed as far back as March 2009. On that basis, the applicant strongly argues that she has a very strong title to occupy the farm and an entitlement to resist any infringement and violation of her rights as a lessee. The institution of the present eviction proceedings is her last endeavour to enlist the assistance of the court, after all else has failed, to evict the 1st respondent from the farm. As is apparent from the papers several attempts were made to get the 1st respondent to vacate the farm, but all came to naught as he failed to accede thereto. Even when he was given formal written notices to vacate, not once but twice, the 1st respondent would not budge. Instead, he engaged the services of his legal representatives to delay his prompt exit from the farm to the extent of opposing this eviction by raising spurious defences.

[28] On the contrary, the 1st respondent seems to contend strongly that the applicant cannot rely on the lease agreement to evict him from the farm because she has been in breach of the material terms thereof in that she, firstly, concluded a sub-lease with him, in breach of clause 28, which clause clearly prohibits sub-letting. Secondly, the applicant, at the time that she concluded and signed the lease agreement with the department in March 2009, she was already in the employment of a State Organ as Councillor, which is strictly prohibited by clause 28 of the agreement. Thirdly, the applicant was, at the time the lease agreement was in a marriage with her husband who was in the employment of the Amathole District

Municipality, a civil servant so to say. That also was a material breach of the lease, a breach of a kind that is inexcusable and so material that it automatically resulted in the termination of the lease agreement, in terms of clause 28 thereof. Fourthly, the 1st respondent seems to bemoan the fact that the applicant entered into an agreement of cession with one Mr Moko in August 2022, when she had promised him to cede all her rights to the farm once she has been employed as a Councillor. For this proposition the 1st respondent relies on the provisions of clause 28 of the lease agreement which stipulates that any cession is strictly prohibited and if such is concluded it will amount to a material breach, the sanction of which is automatic termination of the lease agreement.

[29] At this juncture it is appropriate to have recourse to the applicable legal principles in order to answer the main issue for consideration in this application, whether the applicant has the locus to institute these eviction proceedings and consider other related issues. Indeed, it is trite that if a lessee sublets in breach of the prohibition against subletting. Generally, that would be considered to be a material breach entitling the lessor to cancel the original contract, even if no cancellation clause exists.[22] In *Demos v Saris and Chronis*, the court held that a clause prohibiting **"subletting"** prohibited also cession because '*to hold otherwise, one would be driven to the illogical position that the lessee could let the whole premises without the lessor's consent by ceding his rights but could not let part'.[23] The court further gave a lucid explanation of the meaning, purport and import of the words "cession", "transfer" and "assign" as opposed to subletting when he stated that "the words "cession", "transfer" and "assign" reflect a juristic act which differs in concept and in nature from that of subletting premises under a lease. When a lessee sublets the leased premises he enters into a contract of lease with the sub-lessee, who becomes his tenant and while the lessee remains bound, as such, in all respects, to the lessor. Whatever rights the sub-lessee may acquire he acquires from the lessee by virtue of the agreement of lease concluded by them; his rights do not derive from the lessor. But, when the lessee cedes or transfers his rights under the lease to a third party, he divests himself of such rights by a dispositive act which can*

[22]Kerr's Law of Sale and Lease ibid page 534, Abdulla & Co v Kramer Bros 128 CPD 423.
[23]Per Curlewis J at 114-115. Miller J in the leading case of Floral Displays (Pty) Ltd v Bassa Land and Estate Co (Pty) Ltd (see 1965 (4) SA 99 (D) at 100E.

in no sense be said to be the same as the act by which he sublets the premises. It may be that the practical result in both cases is similar, in the sense that the third party, whether he be a sub-lessee of the premises or cessionary of the lessee's rights, may enjoy occupation of the premises which the lessor had let to the lessee. But it does not follow from that that a stipulation that the lessee shall not cede or transfer his rights under the lease also restrains him from entering into an agreement of sublease in respect of the leased premises".

[30] On the contrary, the 1st respondent strongly asserts the applicant does not have the locus standi to bring the present eviction proceedings for the reason that the lease agreement between her and the department has automatically terminated, consequent upon the various instances of breach committed by her. The 1st respondent elaborates that in the circumstances only the lessor can institute eviction proceedings, not the applicant, as the registered owner of the farm. This is so because, so the 1st respondent contends, the applicant, consequent upon the material breach of the lease agreement, she is no longer the lessee of the farm. He cannot, under the circumstances, rely on the title of being a lessee as there is no valid and operational lease agreement anymore, as same had been automatically terminated when she committed the material and inexcusable instances of breach.

[31] Out of these competing and contrasting versions of the parties, the question that arises is whether indeed the lease agreement has in fact terminated automatically, as contended for by the 1st respondent, and whether the 1st respondent is the right party to raise the applicant's lack of locus standi. Generally, it is accepted that it is the right of an innocent party to a contract to rescind it in the event of a breach[24]. By its very it is an exceptional and extraordinary remedy reserved for use only by an innocent party.[25] In the present matter, and that is quite apparent from the opposing papers, the 1st respondent wrote to the department to report his predicament of being threatened with eviction from the farm and in that way sought its intervention. No doubt that is a clear demonstration that the 1st respondent was well aware of the fact that it is no party to the lease agreement to which the applicant is a party. It is the 1st respondent's own version that the

[24] Christie's The Law of Contract LexisNexis 8th Edition page 317

[25] LAWSA Vol 9 para 423 page 321.

department did not take any positive steps to solve the impasse he has with the applicant or make any intervention, as he expected it to. All that this shows, in my view, is that the department is well aware of the applicant's several instances of material breach of the lease agreement, particularly because it acknowledged receipt of the 1st respondent's correspondence reporting them. The only inevitable conclusion that one is bound to reach is that the department, as the innocent party, having full knowledge of the instances of breach and the remedies that it has in terms of clause 28 of the lease agreement, it has elected not to exercise its right to rescind it. In *Xenopoulor and another v Standard Bank of South Africa* it was held that when party to a contact gives up a remedy there under, that is waiver. The use of the word 'election' to describe such surrender does not dispense with the requirements of waiver, namely proof that the person who is alleged to have waived a right remedy with full knowledge thereof, decided to abandon it whether expressly or by conduct plainly inconsistent with the intention of enforcing it.[26]

[32] The fact that the department has full knowledge of the several instances of breach of the lease agreement by the applicant is glaring and apparent from the fact that it acknowledged receipt of the letter dated 6 September 2023 from the applicant, not once but twice. So, the department had all time and opportunity to do something about the breach of the lease agreement reported to it by the 1st respondent. That, in my view, was a clear demonstration, an outward manifestation, that it has no intention to exercise its right to rescind the lease agreement. In any event it is a trite principle of our law that outward manifestation of the innocent party's intention, viewed objectively, must demonstrate to a reasonable person whether he or she has elected to rescind the contract, as a consequence of the material breach of the lease agreement[27]. In my view the fact that it is only the innocent party that can elect to exercise the right to rescind the contract, in the event of a material breach, persuade me to conclude that the 1st respondent has no business in interfering in the lease agreement between the applicant and the department. He may have reported the instances in which the applicant has been in breach of the lease, but that does not give him a right to raise that as a defence in eviction proceedings instituted against

[26] 2001 (3) SA 498 at 508.
[27] LAWSA Vol 9 para 424 page 322.

him. The reason is plain; he is not a party to the lease agreement and the remedies available therein are available only to a party in that agreement.

[33] Even if I may be wrong in coming to the conclusion that the 1st respondent cannot argue that the applicant has no locus standi to institute eviction proceedings, as he is not a party to the lease agreement, there is another related reason why the applicant should be granted the eviction order sought and that is the doctrine of privity and sanctity of a contract. That doctrine entails, essentially, that the parties must be bound by contracts they make and that it would be ridiculous if total strangers could sue and be sued on contracts in which they were not parties.[28] In *Cosira Development (Pty) Ltd V Sam Lubbe Investment CC t/a Lubbe Construction*[29] the court put the position as follows:

> *"[11] A myriad of factual disputes and legal conundrums arise from the facts of this matter. The factual disputes, which undoubtedly exist, lie at the heart of the application for referral of this application for trial. A number of legal issues, however, arise from the undisputed facts of this matter. In the view I take of the matter it will not be necessary to consider the application for a referral for trial as at least one of those is capable of determination without having recourse to evidence. It concerns the question whether the applicant has the necessary locus standi to claim the relief it seeks. As will become more apparent in the judgment the outcome of this issue is decisive of the matter, and these are my reasons.*

[34] At paragraph [14] the court continued in the following manner

> *"[14] Against this background I turn now to the agreements we are concerned with in this matter. It must be pointed out that the June 2005 and the August 2005 agreements are entirely distinct agreements providing, in effect, for two separate agreements. The relationship between parties in all respects is governed by the agreements and is therefore contractual. No contractual relationship exists between the applicant and Council. A practical and often used way of linking the transactions would have been by way of a tripartite agreement, which would have created a contractual relationship between the original seller (the council) and the successive purchaser (the applicant). In the present matter, although the possibility of the conclusion of a tripartite*

[28] GB Bradfield and RH Christie Christie's The Law of Contract LexisNexis 8th Ed page 317.
[29] 2011 (6) SA 331 (GSJ) paras 11 and 14.

agreement did arise, nothing further happened. The applicant states that a tripartite agreement was considered prior to the conclusion of the August 2005 agreement but discarded as it would have necessitated "a complicated lengthy internal procedure…if the applicant was to be made a party to the agreements already entered into (i.e. the June 2005 agreement)". It follows that in the absence of privity of contract between the applicant and the council I am driven to conclude that the applicant does not have the necessary locus standi to bring the present application against the council …and that the application for this reason alone, must fail".

[35] I am in full agreement with the reasoning of the court in *Corisa Developments* judgment and I align myself with it in the present matter. I, too, find that in the present matter there is overwhelming evidence that the 1st respondent is not a party to the lease agreement and therefore has no business raising the defences that only a party thereto is entitled to raise. And because he is not a party to the lease agreement, his attempt to usurp the contractual remedies provided therein for the benefit of an innocent is ill-conceived and ridiculous, to say the list. The fact that he concluded a sub-lease agreement with the applicant is no justifiable reason to do what our law does not sanction. In fact, the trite principle of our law is that parties in a contract include only those persons who have assumed obligations towards each other. Therefore, those outside of it are not parties to the contract.[30] Put differently, being a private transaction, a contract generally creates personal rights and duties only for the parties to the contract, and for nobody else[31]. There is therefore no way that this court can be part of that untenable situation and thereby enforce an illegality.

[36] Our law reports are replete with many examples where the courts have refused to sanction and enforce illegal arrangements. The decision is of *National Director of Public Prosecutions v Zuma* is but one example where the Supreme Court of Appeal emphasised that courts are constrained by the doctrine of legality, that is to exercise only those powers bestowed upon them by the law.[32]. The court cannot therefore lend itself to the enforcement of an illegality.[33] It then follows that the 1st respondent's point in limine of lack of locus standi cannot be sustained and it

[30] MA Fouche' Legal Principles of Contracts and Commercial Law LexisNexis 8th Ed page 100.
[31] Dale Hutchison et al The Law of Contract in South Africa Oxford 2nd Ed page 223.
[32] 2009 (2) SA 277 (SCA); 2009 (1) SACR 361; 2009 (4) BCLR 393; [2008] 1 All SA 197 para 15.
[33] Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) paras 77 and 99.

falls to be dismissed. This is so because the main lease agreement between the applicant and the department is still extant and has not been terminated. So, the applicant has all the right in law to institute the present eviction proceedings.

[37] What then follows, necessarily, is whether the applicant has complied with the preliminary legal procedures and applicable legislation, if any, that regulate evictions in our law. On her part the applicant has argued vehemently that the present eviction application has been instituted in terms of the common law. In argument her Counsel even stated that the notice, purportedly in terms of issued the Extension of Security of Tenure Act**, ("ESTA")** was issued erroneously and mistakenly under the impression that that piece of legislation was applicable, when Infact it was not. It was therefore argued that this application is governed by common law not by ESTA are not applicable in these eviction proceedings. In this regard Mr Ndabeni made reference to the provisions of section 1(x)(b) which defines the **"occupier"** to exclude, in particular, a person intending to use the land in question mainly for commercial farming purposes.

[38] From the facts of this case, and the 1st respondent's version in particular, so the argument goes, it is quite apparent that the respondents, particularly the first two respondents, are in occupation to advance commercial farming activities and therefore fall outside the definition of an occupier in ESTA.

[39] On the other hand, the 1st respondent holds a totally different view and strongly argues that the present proceedings fall squarely under the provisions of ESTA and not under the common law. Therefore, the 1st respondent argues strongly, that the provisions of that piece of legislation should have been complied with. In particular, the 1st respondent made reference to the fact that the 2nd respondent was residing and working in the farm and if the eviction order is granted, he will suffer immense prejudice as he will lose not only his employment but also a place to stay.

[40] Gleaned from its preamble, the object of ESTA is protecting occupiers living on rural or semi-rural land with the express or tacit consent of the landowner, or by

some other right, unfair eviction. To explain the noble object and mischief sought to be achieved by ESTA, the apex court had this to say in *Baron and Others v Claytile (Pty) Ltd and Another.*

> *"[10] Two provisions of the Constitution are directly implicated: sections 25 and 26. The preamble to ESTA sets out the purpose for which ESTA was enacted as being to provide for security of land tenure and to give effect to the provisions of sections 25 and 26 of the Constitution. Section 25(1) protects the property of the landowner by guaranteeing that no person shall be arbitrarily deprived of their property. But this provision serves to protect the ESTA occupier too, albeit indirectly. How so? For ESTA occupiers to enjoy a form of secure tenure, as envisaged by the Constitution, we must recognise that ESTA occupiers enjoy rights and entitlements over land they occupy, and that these rights and entitlements are every bit as worthy of protection as those of private landowners. This has most recently been established in Daniels but is built on the jurisprudence leading up to it. However, despite this acknowledgement, occupiers may not rely on section 25(1) directly to protect their interests, since the subsidiarity principle provides that where legislation was enacted to give effect to certain constitutional rights, reliance must be placed on the provisions of the specific legislation and challenged if they do not adequately give effect to the constitutional right in question.*
>
> *[11] Section 26 of the Constitution protects persons from being evicted from their homes without an order of court after considering all the relevant circumstances. One of the purposes for which Parliament enacted ESTA was to regulate eviction from land.*
>
> *[12] Previously occupiers of farmland were not protected under common law. They are currently protected by the provisions of ESTA. Section 8 of ESTA deals with the circumstances that may lead to the right of residence being terminated. In the present instance, section 8(2) is applicable as the rights of residence of the applicants arose from their employment by the first respondent and these rights of residence were terminated when they resigned or were dismissed. Section 9 is titled "limitation on eviction" and sets out the procedure that had to be followed after the applicants' right of residence had been terminated. Section 10 applies to eviction of occupiers before 4 February 1997 and is applicable to first, second, third and fifth applicants. Section 11 applies to the eviction of occupiers after 4 February 1997 and is applicable to the fourth applicant. The fourth applicant will be delt with simultaneously with the other applicants as section 11 sets out a lower threshold from the grant of an eviction than section 10. He will not be prejudiced if his position is dealt with in the same way as other applicants".*[34]

[34] 2017 (10) BCLR 1225 (CC); 2017 (5) SA 329 (CC) paras 10 -12; LTC Harms and MR Townsend Amler's Precedents of Pleadings LexisNexis 10th Edition page 191.

[40] It is true that in section 1 of ESTA an occupier is defined as a person residing permanently on the land in question belonging to another person and who on 4 February 1997 had consent to stay on the land or another right in law to do so. However, excluded from that definition are the following; (a) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but includes a person who works the land himself or herself and does not employ someone other than a family member; or (b) a person who has an income greater than the prescribed amount (currently R5 000,00).[35]

[41] In this matter it is not only glaring but also abundantly clear from the 1st respondent's own version that he occupies the farm form commercial purposes. That is apparent from the 1st respondent's answering and the correspondence from his legal representatives, attached thereto, that he bemoans the fact that if he is evicted, he will be losing a livelihood and income. That on its own, in my considered view, make him fall under part of the definition of a person intending to use the land for commercial farming purposes. No doubt that excludes him from the definition of an occupier whose interests, rights and entitlements are worthy of a protection in terms of the ESTA. Secondly, the 2nd respondent has not opposed this application and for that reason this court does not have the benefit of his or their version of events relating to his or their occupancy of the farm, the purpose and duration thereof as well as his or their current residence, how many are they and any other factor that the court needs to take into account in considering whether he or they fall under the definition of an occupier in terms of ESTA. It is, any event, a trite principle that where an answering affidavit is not delivered by the opposite party within the period stipulated in Rule 6(5) (d) (ii), the applicant may set down the application for hearing without that answering affidavit.[36] That is what the applicant has done in respect of the 2nd and 3rd respondents and she is entitled to a judgment against them in their absence.

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[35] Klasse and Another v Van der Merwe NO and Others 2019 (9) BCLR 1187 (CC); 2016 (6) SA 131 (CC) paras 49-66, ESATA section 1, Amler's Precedents of Pleadings ibid page 191.

[36] Herbsterm &Van Winsen the Civil Practice of the Superior Courts of South Africa Juta vol 1 page 13 – 37.

[42] What complicates matters for the 1st respondent in this regard is that he does not shed any light to answer these questions in the answering affidavit, considering the fact that in the same affidavit he also states that another employee left because of the applicant's harassment. It is therefore, that for that reason that I am confident in my finding that the 1st respondent, at whose instance the other respondents occupied, does not comply with the definition of an occupier that they, too, are not occupiers. Anyway, it was incumbent the occupier, who invokes the application of ESTA, to provide that the land in question falls within the definition of that Legislation.[37] The 1st respondent has failed to discharge the onus that rests with him in this regard. I therefore come to the conclusion that the provisions of ESTA are not applicable as the 1st respondent is not an occupier as defined in section 1 of ESTA and the applicant was perfectly justified in instituting the present eviction proceedings under common law. That also applies to the 2nd respondent, in the same measure.

[43] What appears to be the 1st respondent's main reason for opposing the eviction proceedings is that he had concluded a sub-lease with the applicant and a further agreement in terms of which the latter was to cede her rights to the farm to him and then inform the department accordingly. In short, he aggrieved by the fact that she betrayed her and reneged from that agreement. Instead, the applicant concluded a cession agreement with one Mr Moko. It was when he discovered the applicant's betrayal that he reported to the department that the applicant is in breach of a material term of the lease in that he had concluded a sub-lease and cession agreement as well as being in a marital relationship with a someone who is a civil servant, which is prohibited by the terms of the lease.

[44] No proof was provided regarding the applicant's marital status at the time the lease agreement was concluded by the applicant and the department and for that reason that allegation cannot be sustained, especially in the light of the fact that the applicant has disputed it. The same applies to that of the applicant having a

[37] Piters v Steimmet 2025 (6) SA 201 para 12.

boyfriend employed by a municipality. What seems to be very strange and surprising is that, when it suits him, the 1st respondent seems to strongly rely on the provision the had very same lease that renders sub-letting and cession invalid, which he had argued is a material instance of breach that automatically leads to the termination of the lease. When it comes to the sub-lease he concluded with applicant, he seems to ignore that the application of the provisions of clause 28 prohibit sub-letting and cession. In my view the 1st respondent cannot be allowed to blow hot and cold. In the view that I take clause of 28 renders invalid and make it of no force and effect any sub-lease or cession concluded in contravention of that provision and applies with equal force, irrespective of who the parties are, 1st respondent included.

[45] Therefore, I come to the conclusion that the sub-lease that the 1st respondent concluded with the applicant was void and *initio ab* for that reason he has no leg to stand on in opposing this application. In other words, while he blames the applicant for not having the necessary legal standing to institute eviction proceedings, that argument is, in fact, more applicable to him than to the applicant in the circumstances of this case. In my view, for as long as the applicant's lease agreement has not been terminated by the department, so long will the applicant continue to occupy the farm in terms of the lease agreement, and the lease agreement will continue to be valid until terminated by the department. As far as the question of costs is concerned, it is only fair that the applicant be reimbursed for the costs she incurred in pursuing this matter up to its finalisation. In any event it is a trite principle of our law that costs follow the result. I find no justifiable reason to deviate from that principle, and no reason has been advanced to convince me otherwise. As only the 1st respondent put up a strenuous opposition, it is quite appropriate that he be required to compensate the applicant for all the costs incurred.

[46] In the result I make the following order:

(a) That the 1st, 2nd and 3rd respondents, and all those that occupy the farm at their instance, are ordered to vacate the farm within fourteen (14) days from the date of this order;

(b) That the Sheriff of the above Honourable Court together with the Pound Master, duly assisted by the South African Police Services is authorised to carry out the eviction order should the First Respondent and all persons occupying through him not have vacated the property together with all their possessions and movables, including their livestock by the date mentioned in prayer (a) above; and

(c) That the 1st respondent be ordered to pay costs of this application.

T.A. NKELE

ACTING JUDGE OF THE HIGH COURT

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Matter heard on	**:**	**4 September 2025**
Judgment delivered on	**:**	**18 November 2025**