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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: **5852/2022**

In the matter between:

HOHENFELDE DOHNE MERINOS (PTY) LTD

Applicant

and

ANJA HELENE LOUW

First Respondent

KYLE CLAYTON LOUW

Second Respondent

THOKOZANI THUTHUKA SHEZI

Third Respondent

**ALL OTHER OCCUPIERS OCCUPYING HOHENFELDE
FARM, HERCULES PILAAR ROAD, NO 4[...],
MULDERSVLEI WITH OR UNDER
THE FIRST TO THIRD RESPONDENTS**

Fourth Respondent

STELLENBOSCH LOCAL MUNICIPALITY

Fifth Respondent

Heard: 10 October 2023

Delivered: 30 October 2023

JUDGMENT

LESLIE AJ:

Introduction

1. This is an application brought in terms of section 4 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (“**PIE**”) for the eviction of the first to third respondents (collectively, “**the respondents**”) from the immovable property known as Hohenfelde Farm, Hercules Pilaar Road, Muldersvlei, Western Cape (“**the property**”).¹
2. There is no dispute that the procedural requirements in section 4 of PIE have been complied with. The broad issues for determination are the following:
 - 2.1. Whether the eviction proceedings have been properly authorised;
 - 2.2. Whether the applicant is the “person in charge” of the land in question;
 - 2.3. Whether the respondents are unlawful occupiers;
 - 2.4. Whether the provisions of the Extension of Security of Tenure Act 62 of 1997 (“**ESTA**”) apply to the second respondent;
 - 2.5. Whether it is just and equitable to grant the eviction order; and

¹ On the basis that there are no other occupiers residing “with or under” the first to third respondents at the premises, the relief was limited to the first to third respondents.

- 2.6. In the event of the requirements of section 4 having been met, the determination of a just and equitable date for the eviction.

Background

3. Mr Johannes Louw (“**Mr Louw**”) has owned the property since 1984. Mr Louw is the father of the applicant’s sole director, Mr Nicholas Louw (“**Nicholas**”), the first respondent (“**Anja**”) and the second respondent (“**Kyle**”). The third respondent (“**Shezi**”) is Anja’s life partner. Mr Louw vacated the property in May 2019.
4. The respondents currently occupy the main homestead on the property. They do not pay any rent to the owner, Mr Louw.
5. Mr Louw’s wife, Mrs Dorothy Louw (“**Mrs Louw**”) died on 15 May 2021. Prior to her death, Mrs Louw had launched an application to place Mr Louw under curatorship. On 17 March 2021, a *curatrix ad litem* was appointed to investigate and report on whether Mr Louw was incapable of managing his own affairs. On 22 July 2022, an order was made declaring that Mr Louw was incapable of managing his own affairs and appointing a *curator bonis* to Mr Louw’s estate.
6. The applicant has concluded a series of written lease agreements with Mr Louw since 2016. In terms of the latest two leases, concluded in 2018 and 2020 respectively, the applicant rented the whole of the property, including the improvements thereon. The applicant is permitted to use the property for its sheep-farming business and ancillary

activities. In addition to paying rent to Mr Louw,² the applicant pays for water and electricity usage on the property.

7. On 28 January 2022, the applicant, through its attorneys, delivered a letter of demand to the respondents affording them one month's notice to vacate the property. Insofar as the respondents relied on a month-to-month lease to occupy the property, such lease was cancelled. The respondents did not vacate the property.
8. On 1 March 2022, the applicant resolved to institute this eviction application, which was launched on 20 May 2022.

Authority

9. On 3 February 2022, the applicant convened a shareholders' meeting. At this meeting, Mr Louw (who had not yet been placed under curatorship) resigned as the sole director of the applicant (a position he had held since 13 October 2021). Mr Louw³ and Nicholas⁴ resolved to appoint Nicholas as the applicant's sole director.
10. The respondents dispute the validity of Nicholas' appointment as the sole director of the applicant on two grounds. It is alleged that:

² Since July 2022, rental is paid to Mr Louw's curator bonis.

³ Who holds 24% of the shares in the applicant.

⁴ Who holds 51% of the shares in the applicant.

- 10.1. at the time when the applicant resolved to appoint Nicholas as the sole director of the applicant (3 February 2022), Mr Louw lacked the mental capacity to act.
- 10.2. the shareholders' meeting on 3 February 2022 was held without notification to "*the remaining shareholders*" and that, as such, any resolutions purportedly taken at the meeting were invalid.
11. The respondents accordingly contend that, since Nicholas' appointment as director was invalid, "*any acts performed by Nicholas, pursuant to his invalid appointment, inclusive of the institution of these proceedings, are similarly invalid ...*".
12. In my view, this objection is ill-conceived. Firstly, the application was not instituted by Nicholas. It was instituted by the applicant's attorney of record, who signed the notice of motion on 19 May 2022. If the respondents wished to challenge authority, it was incumbent on them to follow the procedure laid down in rule 7(1) of the Uniform Rules of Court.⁵ In the absence of a rule 7 objection, it was not necessary for the applicant's attorney to prove that he had power of attorney to act on behalf of the applicant.
13. In any event, there is insufficient evidence before the court to establish that Mr Louw lacked the mental capacity to act on 3 February 2022. Every person is presumed to be sane, and the onus is on the person alleging the contrary to prove it.⁶ A *curator bonis* was only appointed to Mr Louw's estate on 22 July 2022, more than five months after the

⁵ See *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) paras 14-16 and the authorities cited there.

⁶ *De Villiers v Espach* 1958 (3) SA 91 (T) 95G-96B.

meeting at which Nicholas was appointed as the applicant's sole director.⁷ The *curator bonis* was authorised *inter alia* to take steps to undo certain transactions, including the sale of one of Mr Louw's shares to Nicholas.⁸ No such steps have been taken.

14. In short, the respondents have failed to discharge their onus of establishing that, as at 3 February 2022, Mr Louw was mentally incapable of making decisions, such as his resignation as a director and the appointment of Nicholas as the sole director of the applicant.

15. As regards the allegation that "*the remaining shareholders*" did not receive notice of the meeting on 3 February 2022, the relevant facts are as follows:

15.1. Nicholas held 51% of the shares in the applicant and Mr Louw held 24%.

15.2. The remaining shares (25%) were held by Mrs Louw, who died on 15 May 2021.

15.3. Anja was nominated in the will as Mrs Louw's executor. However, letters of executorship were only issued to her on 22 July 2022 – more than a year after her mother's death. This delay is unexplained by the respondents.⁹

⁷ Even after a *curator bonis* is appointed to a person's estate, this is not necessarily a bar to their making decisions that have legal consequences. As held in *Pienaar v Pienaar's Curator* 1930 OPD 171 at 175: "*Thus even a person who has been declared insane and to whose estate a curator has been appointed can dispose of his property and enter into contracts whenever he is mentally capable of doing so ... The same principle applies a fortiori to the person who has not been declared insane, but has merely been declared incapable of managing his affairs and to whom a curator has on that account been appointed. Here again the curator is merely appointed to assist the person in making legal disposition in so far as such assistance is necessary, according to the nature of the incapacity in question, but the person still retains his contractual and legal capacities and the administration of his property to the full extent to which he is from time to time mentally or physically able to exercise them.*"

⁸ Which transaction took place in February 2021.

⁹ The Master is obliged, in terms of section 14(1) of the Administration of Estates Act 66 of 1965, to issue letters of executorship to a person nominated as executor in a will, upon the written application of that person. The consequences

16. What is clear is that, at the time of the shareholders' meeting on 3 February 2022, there was no appointed executor who was entitled to exercise voting rights on behalf of Mrs Louw's estate.
17. Pending the appointment of an executor, the estate of a deceased person cannot be dealt with, and the assets are 'frozen' until such time as an executor to the estate has been appointed by the Master. The executor derives his or her authority to act only by receiving a grant of letters of executorship. It is trite that:¹⁰

"The fact of nomination in the will does not confer any authority upon the nominee to deal or intermeddle with the estate or constitute him the representative, eg to receive notices."

18. In these circumstances, only 75% of the company's voting rights could be exercised at the shareholders' meeting on 3 February 2022. This is reflected in the resolution dated 3 February 2022.¹¹
19. For these reasons, even if I am wrong in finding that the respondents were obliged to follow the Rule 7 procedure in raising their objection to authority, and failed to do so, they have not established that Nicholas did not have the authority to act on behalf of the applicant in this matter.

of remissness of a nominated executor in obtaining letter of executorship were addressed in *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) para 46.

¹⁰ Meyerowitz on Administration of Estates and Estate Duty (2007 Edition) 8-1, with reference to *Kempman v Law Union and Rock Insurance Co Ltd* 1957 (1) SA 506 (W) and *Brand v Volkskas* 1959 (1) SA 494 (T).

¹¹ Although the respondents indicated that they intended to take steps to set aside this resolution, they have not done so.

Is the applicant the ‘person in charge’ of the property?

20. A ‘person in charge’ is defined in PIE as *“a person who has at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.”*
21. In terms of the current lease agreement between Mr Louw, the owner of the property, and the applicant, the applicant leases the entire property, including “the improvements” which is defined as *“the buildings, installations, fences, irrigation works, structures, dams and roads together with any integral machinery and implements which form part of the foregoing on the Farm.”*
22. In their answering affidavit, the respondents accepted that the homestead which they currently occupy was not *“specifically excluded in the lease”*. They asserted that their legal representatives had been instructed to seek rectification of the lease agreement to exclude the homestead. However, no such proceedings have been instituted.
23. In the circumstances, the applicant clearly falls within the definition of a person in charge as contemplated in section 1 of PIE. The applicant enjoys a contractual right to the free and undisturbed possession of the property, including the homestead which the respondents currently occupy.

Are the respondents unlawful occupiers?

24. An unlawful occupier is defined in PIE as a person who:

24.1. occupies land without the express or tacit consent of the owner or person in charge;
or

24.2. without any other right in law to occupy such land.¹²

25. In their answering affidavit, the respondents advanced several grounds on which their occupancy of the homestead should not be regarded as unlawful.

26. Firstly, the respondents relied on their understanding of the contents of the lease agreement between Mr Louw and the applicant. They “understood” that the homestead was excluded from the ambit of the property leased to the applicant. As set out above, however, this understanding was erroneous and the respondents have to date taken no steps to rectify the lease.¹³ The respondents’ wrong understanding as to the contents of the lease does not render their occupation of the homestead lawful.

27. Secondly, in the alternative, the respondents alleged that they had an oral agreement to occupy the homestead, which they had concluded with Mr Louw and the applicant. No details were set out regarding this alleged tripartite oral agreement (which was disputed by the applicant) and this submission was unsurprisingly not persisted with in argument.

¹² Excluding a person who is an occupier in terms of ESTA and excluding a person whose informal right to land, but for the provisions of PIE, would be protected by the Protection of Informal Land Rights Act 31 of 1996.

¹³ As an aside, as non-parties to the lease agreement they would have considerable difficulty in making out a case for rectification, which is perhaps why they have not done so.

In any event, any oral agreement of lease was terminated by the applicant on notice in its letter dated 26 January 2022.

28. Thirdly, Anja and Kyle claimed that their contracts of employment with the applicant conferred a right of occupation upon them. The authenticity of their written contracts of employment was disputed.¹⁴ In any event, they do not include any term granting Anja or Kyle the right to reside on the property. Again, the respondents indicated that they intended to apply for rectification of these contracts, but this was not done. In argument, the respondents did not persist with this submission.
29. Instead, in argument on this point only one ground for their alleged lawful occupancy was asserted by the respondents. It was contended that “*The Respondents occupy the homestead with the consent of the owner of the Farm, Mr Louw, alternatively concluded an oral lease agreement with Mr Louw.*” This point was not pleaded, and it was not open to the respondents to assert it for the first time in argument. In any event, no detail was put up in argument as to the timing or terms of the alleged agreement with Mr Louw.
30. In any event, the existence of an oral lease agreement with (or consent to remain in occupation by) Mr Louw is highly improbable, having regard to the clear terms of the written lease agreement with the applicant. The written lease affords the applicant the right to occupy the entire property including the homestead, in exchange for rent. The

¹⁴ For one thing, Anja signed Kyle’s contract on behalf of the employer and Kyle signed Anja’s contract on behalf of the employer.

terms of any oral lease allegedly concluded between the respondents and Mr Louw would fly in the face of his written lease with the applicant.¹⁵

31. For these reasons, I conclude that the respondents are indeed unlawful occupiers within the meaning of PIE.

Does ESTA apply to the second respondent?

32. If it was the respondents' position that Kyle fell within the scope of ESTA, it was incumbent on them to pertinently allege and prove this.¹⁶ In particular, Kyle was required to put up proof that his income fell below the current threshold of R13,625 bringing him within the ambit of the definition of an occupier under ESTA.¹⁷
33. As held by the SCA in *Frannero Property Investments v Selapa*,¹⁸ an alleged occupier's *ipse dixit* is not sufficient, bearing in mind that his or her income is a matter that falls within his or her peculiar knowledge:

“Such a bare averment [that the respondents were unemployed and earned below the applicable threshold] was not adequate for the discharge of the onus on the respondents to prove that their income did not exceed the prescribed maximum income. The respondents' income was a matter peculiarly within their knowledge. Casting the burden of proof on them in this regard was not unduly harsh. On the other hand, placing such a burden on the applicant would cause undue hardship.”

¹⁵ Although the respondents have set out no detail as to the terms of this alleged oral lease, implicitly they suggest that it is of an indefinite duration. This could well render it unlawful in terms of section 3 of the Subdivision of Agricultural Land Act 70 of 1970.

¹⁶ *Frannero Property Investments v Selapa* 2022 (5) SA 361 (SCA) paras 24, 28-32.

¹⁷ Section 1(1)(x) of ESTA, item (c), read with the regulations.

¹⁸ *Supra* at para 29.

34. In the present matter, save for a bald allegation that Kyle earned less than R5000 per month and that “*the provisions of ESTA may also apply to him*” (emphasis added), no evidence whatsoever was adduced to support this. No reason has been provided for why, for example, Kyle could not simply have annexed copies of his bank statements to establish his income. His failure to do so warrants an adverse inference. The consequence is that Kyle has not met the onus of proving that he should be regarded as an ESTA occupier.

Is it just and equitable to evict the respondents?

35. In the recent decision of *Grobler v Phillips* (“*Grobler*”)¹⁹ the Constitutional Court was at pains to point out that:²⁰

“PIE was enacted to prevent the arbitrary deprivation of property and is not designed to allow for the expropriation of land from a private landowner from whose property the eviction is being sought.”

36. Although it is appropriate to have regard to all the relevant facts and circumstances of a particular matter, in determining a just and equitable outcome a significant consideration

¹⁹ 2023 (1) SA 321 (CC).

²⁰ Para 37.

is whether the respondents will be rendered homeless as a result of an eviction order. As the SCA noted in *City of Johannesburg v Changing Tides 74 (Pty) Ltd*:²¹

“... an eviction order in circumstances where no alternative accommodation is provided is far less likely to be just and equitable than one that makes careful provision for alternative housing.”

37. As the court put it in *Grobler*:²²

“An unlawful occupier such as Mrs Phillips does not have a right to refuse to be evicted on the basis that she prefers or wishes to remain in the property that she is occupying unlawfully. In terms of s 26 of the Constitution, everyone has the right to have access to adequate housing. The Constitution does not give Mrs Phillips the right to choose exactly where in Somerset West she wants to live.”

38. In the present matter, it is not in dispute that the respondents can afford to relocate to suitable accommodation of their choosing. They cannot reasonably expect to continue residing indefinitely, rent-free, on the property. The applicant attached to its founding papers various advertisements for rental properties that would be suitable for occupation by the respondents. There was no meaningful response to this – save for unsubstantiated allegations that the particular examples attached were unsuitable for the respondents’ family pets or running their clothing business.²³ These complaints fall within the realm

²¹ 2012 (6) SA 294 (SCA) para 15, with reference to *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 (7) BCLR 723 (CC).

²² Para 36.

²³ The clothing business run by Anja and Shezi has in any event since relocated from the property and is no longer being operated from the farm.

of the irrelevant considerations identified by the court in *Grobler*. The respondents' constitutional rights to adequate housing are not at risk. Their specific preferences as to where they wish to reside (and whether they wish to pay rent or not) is neither here nor there.

39. I furthermore accept that the applicant is prejudiced in the operation of its sheep farming business by the respondents' continued unlawful occupation of the homestead. Without delving into the plethora of allegations and counter-allegations as to the damage being done to the sheep-farming business, it is clear that the parties are hostile to each other and that their relationship has completely broken down. The continued presence of the respondents on the property is inimical (to say the least) to the smooth and efficient operation of the applicant's farming business. The applicant is lawfully entitled to make use of the entire property, including the homestead, in pursuing its farming operations. It pays rent and other costs to the owner for this privilege. For as long as the respondents remain in unlawful occupation, the applicant is unable to realise the full benefits of the property it rents.

40. In *City of Johannesburg*²⁴ the SCA commented that "*In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or buildings situated on the land, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order.*" This principle finds application here.

²⁴ Supra at para 19.

41. In these circumstances, I consider that it is just and equitable to grant the eviction order sought.

What is a just and equitable date for the eviction?

42. As at the date of the hearing of this application, more than a year and half had elapsed since the respondents were requested to vacate the property.²⁵ The eviction application was launched more than 16 months ago.
43. The applicant nonetheless seeks to give the respondents six weeks' notice from the date of the order to vacate the property. I consider this timing to be just and equitable, particularly having regard to the fact that the respondents can afford alternative housing and in view of the length of time it has taken to finalise these proceedings.
44. Finally, the applicant filed a notice to strike out various portions of the answering affidavit on the ground that they contained hearsay or other irrelevant matter. These paragraphs have no bearing on the outcome of this matter, and I do not deem it necessary to make a formal order striking them out.
45. On the question of costs, counsel for both parties were in agreement that the costs occasioned by the previous postponements of this application, on 16 February 2023 and 24 May 2023, should be costs in the cause.

²⁵ In the applicant's letter dated 26 January 2022, the respondents were called on to vacate by 28 February 2022.

Order

In the premises, I make the following order:

1. The first to third respondents are ordered to vacate the immovable property known as Hohenfelde Farm, Hercules Pilaar Road, No 4[...], Muldersvlei, Western Cape Province (**“Hohenfelde Farm”**) by no later than **12h00 on 11 December 2023**;
2. Should the first to third respondents fail to vacate Hohenfelde Farm within the period specified in paragraph 1 above, the Sheriff of the Court is directed and authorised to evict them on **12 December 2023**;
3. The first to third respondents shall pay the costs of this application, including the costs occasioned by the postponements on 16 February and 24 May 2023, jointly and severally the one paying the others to be absolved.

G.A. LESLIE

Acting Judge of the High Court

Appearances:

For the applicant:

H Bevis-Challinor

Instructed by Bester and Lauwrens Attorneys

For the first to third respondents:

M A McChesney

Instructed by Greenberg & Associates