IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC 161/2021

Before: The Honourable Acting Judge President Meer and Acting Judge Flatela

Heard on: 01 December 2021

Delivered on: 09 December 2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED: ~~YES~~ / NO

09/12/2021
DATE

SIGNATURE

In the matter between:

DAVID DE VILLIERS First Appellant

FLENTERSKLOOF FARMING T/A SWANPACK FRUIT CC Second Appellant

and

ALICIA N SMITH First Respondent

HENDRIK BOSCH Second Respondent

MZIYANDA SATSHA Third Respondent

JUDGMENT

MEER AJP

Introduction

[1] The Appellants appeal against a judgment and order of the Paarl Magistrates' Court dated 1 June 2021 in terms of which *inter alia*:

1.1 The Respondents' rights of residence and use of the dwelling they occupied on the Flentersklоof Farm, Simondium, Paarl, Western Cape were restored;

1.2 The Respondents' reinstatement to the dwelling was ordered;

1.3 The Appellants were interdicted from evicting and disturbing the Respondents' peaceful possession and enjoyment of the dwelling; and

1.4 The Appellants were ordered to pay the sum of R830.00 to the Third Respondent and R3,540.00 to the Second Respondent in respect of actual damages, and the sum of R10,000.00 to each of the Respondents for the suffering and inconvenience caused by their eviction.

[2] The grounds of appeal in essence are, firstly, that the court *a quo* erred in awarding any relief to the Respondents in the light of material disputes of fact as to whether it was the Appellants who unlawfully caused the eviction of the Respondents. The court *a quo* erred in not referring the matter for oral evidence. Secondly, the court *a quo* erred in awarding damages in the absence of evidence to substantiate the damages claimed. Thirdly, it is contended that the court *a quo* erred in ordering the Appellants to restore possession of the dwelling given that,

at the time the matter was argued, the Respondents had already moved back into the dwelling.

Background facts, pleadings and evidence

[3] The farm Flenterskloof is owned by the De Villiers Family Trust. The First Appellant is the person in charge of the daily farming activities of the farm. The Second Appellant is described as the entity that was used to purchase, repack and distribute sundried tomatoes. Fruit and herbs are cultivated on the farm.

[4] It is common cause that on 24 January 2021 at about 22h30, the Respondents were made to leave House 10 by labour recruiter Mr Zinzile Mbonyane and his workers, who thereafter occupied the dwelling until 27 January 2021, whereafter the Respondents moved back into the house on 28 January 2021.

[5] The Respondents contend that the First Appellant caused their eviction by instructing Mr Mbonyane and his workers to evict them. This is fervently denied by the Appellants.

[6] The founding affidavit of the First Respondent (as First Applicant in the court *a quo*) states that on 24 January 2021 the First Respondent caused 25 temporary workers from Franschhoek and Grabouw to illegally evict the Respondents (as Applicants in the court *a quo*) and move into their house. Mr Charles, the labour agent who spoke on behalf of the 25 workers, informed the Respondents that he acted on the instruction of Mr David de Villiers, the First Appellant, who gave them permission to evict the Respondents and move into their house. The affidavit states: "Because the very large group of people threatened our lives to move out and throwing our possessions out, we reluctantly, fearing for our lives left our house. We were forced to seek refuge at neighbours and people in the vicinity until we on our own volition, moved back into our dwelling on 28 January 2021 when it was empty. We however feared that the landowner may

again try to unlawfully evict us from our house and live in a state of fear and anxiety".

[7] In denying that he ordered the eviction, the First Appellant (as First Respondent in the court *a quo*), in his answering affidavit states that he was contacted by Mr Mbonyane, a seasonal contractor enquiring about seasonal contract work on the farm. Mr Mbonyane stated that he needed accommodation for his team / employees on the farm. On 21 January 2021, the First Appellant explained to Mr Mbonyane "that the sugar content of the grapes was not ready for harvesting yet and it will only take about 10 persons half a day to harvest and that they could not stay on the farm." The First Appellant states that no agreement was reached between himself and Mr Mbonyane as to harvesting the grapes or plums or specifically about residing on the farm.

[8] This averment in the answering affidavit is denied by Mr Mbonyane in an affidavit in support of the First Respondent's replying affidavit. Mr Mbonyane states that he had enquired from the First Appellant about providing accommodation on the farm, as his labourers live in Franschhoek and Grabouw and it would be too costly for them to commute daily to the farm. According to Mr Mbonyane, the First Appellant indicated that they could stay in "Boys'" house as he passed away recently and explained that they would have to remove two men living in the house stating, "julle moet hul uithaal uit die plek" and that they could then move in. On arrival at the farm on the evening of Sunday 24 January 2021, they spoke to the two men living in House 10 and explained that they were there on the instructions of the First Appellant. Mr Mbonyane's affidavit states "to my knowledge we did not damage, destroy or steal any possessions of the residents of the house… no one was assaulted. It was dark and

people were emotional and upset. The residents of the house moved out and we moved in as per instruction of the First Respondent".

[9] According to the First Appellant, he only came to know about the eviction when notified thereof by the police. His answering affidavit states that on 24 January 2021 at around 23h10, he was informed by the police that that there were 24 aggressive people causing problems at the houses on the farm. He instructed the police to remove the persons concerned as they were trespassing. He was not contacted again by the police. On Monday 25 January 2021 he discovered that 24 people had move into House 10. He asked Mr Mbonyane and his team to vacate the house, but they refused. In an attempt to defuse the situation, he offered to pay Mr Mbonyane R2,150.00 instead of R1,950.00, to which Mr Mbonyane agreed on the condition that they vacate the house after the harvest.

[10] This is denied in reply. The First Respondent says it is odd that the police did not remove the labourers after being instructed by the First Appellant to do so. Mr Mbonyane in his supporting replying affidavit states the police left them in the house as they had permission from the First Appellant to live there and that if the police were not convinced of this, he and his workers would have been arrested or evicted. Mr Mbonyane denies any offer by the First Respondent to pay him more money on condition that they vacated the dwelling.

[11] On events thereafter, the founding affidavit states that the Respondents were unable to lay criminal charges against the mob as they did not know their names or specific whereabouts. Moreover, when their legal representative Mr Julius phoned the First Appellant on 28 January 2021, he would not give an undertaking to restore possession of the dwelling. As much is confirmed by Mr Julius in a supporting affidavit and denied by the First Appellant in answer. After they had moved back into their dwelling, on 2 February 2021 a building contractor arrived with instructions from the First Appellant to close up the windows and doors with brick and mortar. According to a neighbour, Rosy Links, the builder

indicated that he had instructions from the owner to close up House 18 and House 10. As much is confirmed in a supporting affidavit by Rosy Links.

[12] The answering affidavit denies the instruction to brick up House 10 but concedes that, unsettled by the return of 24 people to the farm on 28 January 2021, the First Appellant requested a builder to brick up Houses 12 and 20. The answering affidavit avers moreover that this unfortunate incident appears to be directly the result of miscommunication between the seasonal contractor and his crew who were not familiar with the farm in its current state but acted on the backdrop of historic seasonal practice. The incident was exploited and abused by Rosy Links due to a pending eviction application against her.

[13] In reply, the First Respondent states that their legal representative was instructed to bring an urgent application. They feared their house would be closed permanently if they dared to leave on their daily errands. The supporting affidavit of Mr Mbonyane in reply denies any miscommunication between himself and the First Appellant.

[14] With regard to the claim for damages, the founding affidavit merely states that "as a result, we suffered various damages of inconvenience and as indicated in annexure 'ASO2'".

A list of stolen and damaged property of occupiers: 24 January 2021 contains the following as annexure "ASO2":

Mr H Bosch: (Second Respondent)

- Soiled bed – damaged – R1000
- TV – damaged – R850
- DVD – stolen – R300
- Amplifier – damaged – R450
- Music System – damaged – R150
- Cell phone charger – stolen - R70

- Running shoes – stolen – R350

Mr M Satsha: (Third Respondent)

- Cell phone – stolen – R650
- Fresh red meat – stolen R80

[15] The First Appellant's answering affidavit notes the failure to attach photographs, quotes for repairs or receipts of the damaged belongings. Cell phones, it is alleged, were present but no photographs or videos are attached of the mob and their conduct. To which, in reply, the Respondents state that recording the events was the furthest thing from their minds. They were panicking, feared for their lives and uncertain what to do next. They are unable to acquire quotes for their damaged or stolen property as the items are neither new nor in an excellent condition. They also do not have the means or money to transport their heavier things or to have them assessed and valued by a professional or expert. Despite the lack of proof of their damages, this Court has a wide discretion in terms of the Extension of Security of Tenure Act 62 of 1997 to still grant them the relief they seek.

[16] Such were the pleadings and evidence, clearly replete with disputes of fact.

Judgment of the court *a quo*

[17] In an inappropriately terse judgment, the court *a quo* astonishingly, without considering and weighing up the two disputed versions, found that the application did not raise real and genuine dispute of fact. Moreover, without assessing the claim for damages, the court accepted the damages sought and went on to grant the application with costs.

Discussion

[18] The disputes of fact which arise in this matter are twofold, namely whether the Appellants caused the Respondents to be evicted and whether the Respondents suffered the damages as alleged by them. A point of contention is also whether these disputes of fact are real, genuine and *bona fide* and whether they could be resolved on the papers. In *Wightman t/a JW Construction v Headfour Pty (Ltd) and Another* 2008 (3) SA (371) (SCA) at paragraphs 12 and 13 it was stated:

"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegation are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree...

[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

[19] A consideration of the averments in the answering affidavit disputing the facts as stated by the Respondents (as Applicants in the court *a quo*) shows that the Appellants (Respondents in the court *a quo*) before us, raised facts that are disputed seriously and unambiguously, possessed knowledge of them and were

able to provide answers and countervailing evidence, as referred to in *Wightman supra*. The averments in the answering affidavit in denial are also in my view not so far-fetched or clearly untenable justifying their rejection merely on the papers, as occurred in the court *a quo*. There were in my view material disputes of fact pertaining to the eviction of the Respondents which were insoluble on the papers and the court *a quo* erred in not finding so. This was clearly a matter in which the court *a quo* ought to have called for oral evidence on the dispute of fact.

[20] Disquietingly, it appears to have escaped the court's attention that Mr Mbonyane's supporting affidavit in reply clearly introduced new material which the Appellants were not given an opportunity to respond to. I note that the material disputes of fact prevail even without venturing into the admissibility of that affidavit, which was not a feature on appeal. What also appears to have escaped the court's attention in ordering the restoration of their residence is the fact that this had already been achieved by the Respondents themselves and there was no challenge thereto by the Appellants.

[21] With regard to the damages, the Respondents (as Applicants in the court *a quo*) bore the onus to prove the damages they suffered on a balance of probabilities. On their own version, the Respondents were not able to provide such proof. Absent proof which went beyond a mere list presented for actual damages, the award for such damages was wrong. At the very least, quotes and an affidavit pertaining to the replacement value of the items listed could have been procured. In respect of general damages, the absence of any evidence or attempt at explanation whatsoever rendered the award of such damages clearly wrong. Mr Carollisen for the Respondents conceded that the appeal should be upheld in respect of the damages claim and that the matter should be remitted to the court *a quo* for oral evidence to be heard on this aspect only. Mr Prinsloo for the Appellant, whilst calling for the appeal to be upheld in its entirety, agreed that

the issue of damages should be remitted to the court *a quo* for the hearing of oral evidence.

[22] In keeping with the practice of this Court not to award costs unless in exceptional circumstances, of which I find there to be none in this matter, I make no order as to costs in granting the following order:

1. The appeal is upheld.
2. The matter is remitted to the court *a quo* for oral evidence on the merits and on the quantum of the claims for damages.

Y S MEER
Acting Judge President
Land Claims Court

I agree.

L FLATELA
Acting Judge
Land Claims Court

APPEARANCES

For the Appellants:	Advocate J P Prinsloo
Instructed by:	**Terblanche Attorneys**
For the First, Second and Third Respondents:	Advocate C Carolissen
Instructed by:	**Julius at Law Attorneys**