IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC 04/2018B

Before: **The Honourable Acting Judge President Meer**

REGISTRAR OF THE LAND CLAIMS OF SOUTH AFRICA
RANDBURG
Private Bag X10060, Randburg 2125
2019 -07- 31
LCC-002
GRIFFIER VAN DIE GRONDEISEHOF
SUID-AFRIKA
RANDBURG

Heard on: 30/7/2019

Delivered on: 30/7/2019

DELETE WHICHEVER IS NOT APPLICABLE

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

31/7/2019
DATE

YR
SIGNATURE

In the matter between:

MOLOKO PIET MOGABULE First Applicant
AND ALL OTHER PERSONS CLAIMING
A RIGHT OF RESIDENCE THROUGH HIM ON
A PORTION OF THE FARM VAALBANK 511 JR

LYDIA PHOISANA MOGABULE Second Applicant

and

NEELS VAN TONDER TRUST	First Respondent
KUNGWINI LOCAL MUNICIPALITY	Second Respondent
THE HEAD OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Third Respondent
SHERIFF BRONKHORSTSPUIT	Fourth Respondent

In re:

NEELS VAN TONDER TRUST	Applicant

and

MOLOKO PIET MOGABULE AND ALL OTHER PERSONS CLAIMING A RIGHT OF RESIDENCE THROUGH HIM ON A PORTION OF THE FARM VAALBANK 511 JR	First Respondent
CITY OF TSHWANE MUNICIPALITY	Second Respondent
THE HEAD OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Third Respondent

---

JUDGMENT DELIVERED 30 JULY 2019

MEER AJP

Introduction

[1] This is an application for the rescission of an eviction order granted by this Court on 28 May 2018 against the Applicants. The eviction order was granted in circumstances where the Applicants did not file appearances to defend. The Court ordered their eviction from Portion 33 of the farm Vaalbank 511 JR, Bronkhorstspuit, Gauteng.

[2] Applications for rescission of judgment are provided for in terms of Rules 58(6) and (7) read with section 35(11) of the Restitution of Land Rights Act, 22 of 1994. The aforementioned Rules provide as follows:

> 58(6) "A party may apply to the Court to rescind or vary any judgment granted in his or her absence, provided the application is filed within twenty days after he or she became aware of the judgment or order.
>
> (7) An application in terms of subrule 6 may be granted only if the applicant shows good cause for such rescission or variation".

[3] The provisions of Rules 58(6) and (7) track those of Rule 31(2)(b) of the Uniform Rules of Court which, in turn, are based on the common law principle that a Court may, on good cause shown, set a judgment aside. It is established law that an applicant for rescission of judgment is required to show good cause for the rescission of default judgements.

[4] In *Hassim Hardware v Fab Tanks* [2017] ZASCA145 at paragraph 12 the Court stated:

> " It is established law that the courts generally require an applicant for rescission of judgment to show good cause by (a) giving a reasonable explanation for the default; (b) showing that his/her/ its application for rescission is made *bona fide* and not made merely with the intention to delay the plaintiff's claim; (c) showing that he/she/its has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of

success. Regarding the last-mentioned requirement, it is trite law that an applicant for rescission of judgment is not required to illustrate a probability of success, but rather the existence of an issue fit for trial."

[5] Each of the Applicants apply for rescission on separate grounds. The First Applicant based his application on the assertion that the First Respondent lacks *locus standi*, that he was not in wilful default to defend the main eviction application, that good cause exists for the rescission and that the order against him was erroneously sought or granted.

[6] The Second Applicant, who is the wife of the First Applicant, was granted leave to join these proceedings on 6 December 2018 on the basis that she has a direct substantial interest in the matter. She seeks in this application an order rescinding the default eviction order obtained against the First Applicant, alternatively an order declaring that the words "all persons occupying rights of residence through him" as reflected in the judgment do not include her. She contends that she is an occupier in her own right and for this she relies on the Constitutional Court's judgment in *Klaase and Another v Van De Merwe N.O. and Others* [2016] ZACC 17 at paragraph 66. She contends that she is an occupier in her own right and if the First Respondent wishes to evict her, it ought to first terminate her rights of residence under lawful grounds, and set out separate grounds for her eviction. I shall deal with each Applicants' application in turn.

The Application by the First Applicant

Locus standi

[7] The First Applicant initially contended that the First Respondent, being a registered trust, did not have the requisite *locus standi* to bring the eviction application. The First Respondent ought to have cited a nominee since, it is alleged, that a trust itself cannot be a party to legal proceedings. This argument,

which was properly abandoned at the hearing, is nonetheless briefly dealt with so as to assist other practitioners.

[8] Land Claims Court Rule 10 clearly stipulates that an entity such as a trust may be cited as a party in its own name without reference to the names of its members or of its bearers. It is in the circumstances somewhat disconcerting that the First Applicant initially chose to attack the First Respondent's *locus standi*.

Judgment erroneously sought or granted

[9] The First Applicant initially alleged that the First Respondent's attorney proceeded erroneously in setting down the eviction application for hearing without serving a notice of set down on the Applicant. This was also properly abandoned at the hearing. Mr Malatji for the Applicants properly conceded that as the First Applicant did not file a notice of appearance as contemplated in Rule 25(1) after the notice of motion was served on him, in terms of Rule 58(3) the application for the matter to be heard could be made without notice to the party who has failed to file a notice of appearance.

[10] Mr Malatji further accepted (i) that the notice of motion invited the First Applicant to participate in the case and it even contained a draft notice of appearance which the Applicant was invited to fill in and send to the Registrar as well as the First Respondent's attorney; (ii) that the Applicant chose not to participate in the matter despite the clear wording in all official languages in Form 9 that formed part of the annexures to the notice of motion; (iii) that the notice of motion informs the First Applicant that should he not file a notice of appearance within the stipulated time, he will not receive any further documents in the case and he may not participate in the case and the Court may give a judgment without giving him any further notice.

***Bona fide* defence**

[11] The First Applicant did not attempt to respond to the direct factual allegations of misconduct, save for his arrest for the possession of dagga, an activity he denies. Likewise he denies selling alcohol on the farm. He furthermore denies that he was keeping livestock on the farm in excess of what he was entitled to. These are bare denials which do not constitute genuine factual disputes. No explanation is given with regard to the aggressive, intimidating, disrespectful and racist language it is alleged the First Applicant used against the First Respondent's representative, the laying of false charges against the First Respondent's representative with the police or the aggressive assault allegedly perpetrated on the First Respondent's representative and the attempted assault by the First Applicant's son, Sunnyboy. All these allegations are made in the founding affidavit to the eviction application. The First Applicant also does not deal with the direct factual allegations contained in the founding affidavit to the eviction application regarding the affidavit of his wife, Lydia, linking him directly to the theft of equipment belonging to the First Respondent.

[12] In the circumstances the First Applicant has not placed before this Court a set of facts, which if true, will constitute a defence. The bare denial of some allegations, without more does not constitute a *prima facie* case or *bona fide* defence, or the existence of an issue that is fit for trial. Mr Malaji conceded as much at the hearing.

[13] The First Applicant in the circumstance has failed to prove the good cause requirement for the rescission of the judgment granted against him. In the circumstances his application cannot succeed.

The Application by the Second Applicant

[14] In light of the Constitutional Court judgment in *Klaase* which stipulates that a spouse of an occupier is an occupier in her own right entitled to the protection of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA"), the reference to the Second Applicant by the First Respondent as "all other persons claiming a right of residence through him" does not pass scrutiny. It is clear from the papers that the Second Applicant is an occupier in her own right who has continuously and openly resided on the land in excess of 3 years. She thus falls within the ambit of occupiers under sections 3(4) and 3(5) of ESTA. The sections respectively provide that one and three year open and continuous residence on land shall be presumed and deemed to be with consent.

[15] The fact that the Second Applicant might have sought employment elsewhere for a time and then returned to the farm does not constitute a relinquishment of her right of residence. This Court in *Mathebula and Another v Harry* 2016 (5) SA 534 (LCC) at paragraph 21 made clear that in order for a person to reside on a farm there need not necessarily be continuous physical presence or residence. The Court stated as follows:

> "The meaning of "reside" as used in section 6(2)(dA) should not depend on mathematical formulas, such as how many days in a week does a person spends on a particular farm. Nor should it depend on the subjective views of the owner of the land or the occupier. In determining whether a person is a resident, there should at least be a degree of actual physical presence. But this need not necessarily be continuous. Importantly, the court should accept that actual physical presence may be interrupted by economic factors, such as employment. Where this is the case, there must at least be an intention – exhibited by conduct – to return on a permanent basis to one's residence. It is wrong to assume, in all instances, that simply because one lives elsewhere out of economic necessity, that fact should *ipso facto* exclude their residence on a particular farm."

[16] In the present case as is aptly pointed out by the Second Applicant, her physical presence was interrupted by employment. It does not mean that she was no longer a resident when the court papers were issued.

[17] In the circumstances the eviction order against the Second Applicant cannot stand and the default judgment against her must be rescinded.

[18] I pause to mention that the Second Applicant's right to family life under section 6 (2)(d) of ESTA does not protect the First Applicant from eviction and entitle him to the rescission of the judgment against him. The right to family life is not unqualified. A family member's residence with an occupier cannot be countenanced if such would result in injustice, unfairness and inequity to the landowner. See *Hattingh and Others v Juta* 2013 (3) SA 275 CC at para 37. In view of the unrefuted allegations of misconduct, criminal activity and the difficult relationship with the First Applicant, his continued residence would result in injustice, unfairness and inequity to the First Respondent. This notwithstanding, before the hearing, I unsuccessfully attempted to get the parties to settle this matter and find a way for the First Applicant's continued residence on the farm with his wife, perhaps with stringent conditions pertaining to his conduct and continued residence. It is my hope that a settlement along those lines can still be reached, and I conveyed as much to Mr Grobelaar for the First Respondent, when I handed down my order below, in Court.

Costs

[19] In keeping with this Court's practice not to grant costs unless there are exceptional circumstances, of which I find none, I intend making no order as to costs.

[20] I accordingly order as follows:

1. The application for rescission of judgment by the First Applicant is dismissed.
2. The application for rescission of judgment by the Second Applicant is granted.
   2.1 It is declared that the Second Applicant is an occupier in her own right and that the words "all other persons claiming right of residence through him" in the eviction application brought by the First Respondent do not include the Second Applicant;
   2.2 The Fourth Respondent is directed not to execute against the Second Applicant and the warrant of execution against her subsequent to the granting of the eviction order against the First Applicant is set aside.

Y S MEER
Acting Judge President
Land Claims Court

APPEARANCES

For Applicants:	Adv. T M Malatji
Instructed by:	Sithole Mokomane Attorneys

For first Respondent:	Mr. P Grobbelaar
Instructed by:	Peet Grobbelaar Attorneys