IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
08/02/2012 .....
DATE SIGNATURE

Case No: 36168/2011
Date heard: 01/02/2012
Date of judgment: 08/02/2012

In the matter between: 2/2/2012.

Hetag Holdings A/S (Incorporated in Denmark) Registration Number: 2006/017089/10)	APPLICANT
and	
Phillip Ellis	FIRST RESPONDENT
Jolandie Ellis	SECOND RESPONDENT
Lephalale Local Municipality	THIRD RESPONDENT

JUDGMENT

DU PLESSIS J:

The applicant is the owner of immovable property known as the Remaining Extent of the farm Varkfontein 141, Registration Division KQ, Province of Limpopo ("the farm"). Alleging that the first and second respondents,

a married couple, reside on and are in possession of the farm, the applicant seeks an order for "delivery by the first and second respondents, to the applicant" of the farm. No relief is sought against the third respondent, it plays no role in the proceedings and I shall refer to the first and second respondents collectively as "the respondents".

There are on the papers disputes of fact. There are averments in the applicant's replying affidavit that are in dispute. The essential facts are, however, common cause. I proceed to summarise those common cause facts.

The applicant and another company, Morong Safaris (Pty) Ltd ("Morong"), are related companies. The first respondent had been in Morong's employ as a farm manager since 2002. At all relevant times until about March 2011 Morong also employed the second respondent as a "general worker". It was a term of the first respondent's employment contract that he would be entitled to a fully furnished house to live in on the farm. It is not in issue that until 8 July 2011 the respondents lived in the house on the farm.

Following allegations of misconduct, the first respondent was suspended in his employment on 28 March 2011. Disciplinary proceedings against him were also commenced.

Based on allegations that the first respondent was seriously jeopardising the integrity of the farm itself and was also guilty of serious misconduct, Morong and the applicant on 1 June 2011 launched an urgent application in this court. The application was aimed at relocating the respondents at the applicant's and

Morong's cost, from the house on the farm to alternative accommodation. This court issued a rule nisi and the return day thereof came before the court on 17 June 2011.

On 17 June 2011 and by agreement between the parties, this court made an order in terms whereof the respondents were to vacate the house on the farm subject thereto that the applicant would not allow it to be occupied and that the respondents were entitled to inspect it once a week. The order records that it did "not constitute a waiver of the respondents' rights of tenure." The order was to be effective pending proceedings that the applicant had to institute for the eviction of the respondents. The present application constitutes those proceedings.

The applicant's founding papers were drafted on what I might term the narrow basis of a classical *rei vindicatio*: The applicant is the owner of the farm and the respondents are in possession thereof. Mr Venter for the respondents correctly pointed out that in the circumstances the applicant at least had to prove its ownership and the respondents' possession (**Chetty v Naidoo 1974 (3) SA 13 (A)** 20C to D).

It is not in issue that the respondent is the owner of the farm.

As for possession, the respondents no longer reside on the farm. For the applicant Mr Vorster submitted that they nevertheless still possess the residence on the farm. For that submission counsel relied on the order of 17 June in terms whereof the respondents asserted their right of tenure. Under our law

possession comprises two elements: a physical control over the thing possessed and the intention to possess (**Van der Merwe: Sakereg** (2nd edition) p.89 to 91 *s.v.* "Omskrywing van Besit"). The fact that the respondents assert a right of tenure of the house on the farm does not render them in possession thereof. I shall nevertheless assume in favour of the applicant that that the respondents exercise physical control over the house by reason of their right under the order to inspect the house once a week and by reason further of the applicant's obligation under the order not to allow the house to be occupied. It follows that at best the applicant has proved that the respondents exercise a limited control over the house on the farm. In the circumstances the relief that the applicant seeks, namely that the respondents be ordered to deliver the farm to it is inappropriate. Counsel for the applicant did not seek a more limited and appropriate order. I shall nevertheless assume in favour of the applicant that the court could fashion a more limited order that addresses the limited control that the respondents exercise over the house. It is to the possibility of such more limited relief that I shall now turn.

It is common cause that the first respondent's employment contract with Morong entitles him to occupy the house on the farm. It is common cause that it is by virtue of that right that the respondents have lived in the house on the farm until they vacated it under the order of 17 June but without waiving the right to live on the farm. In the opposing papers the respondents rely on this right of residence. They contend, rightly so, that until the first respondent's contract of employment has been terminated, their right of residence continues. In the

answering affidavit, attested to on 25 August 2011 the first respondent pertinently alleges that the disciplinary proceedings against him have been concluded and that the outcome thereof is "currently awaited'.

The applicant does not dispute that as long as the employment contract continued, the respondents were entitled to possession of the house. In its replying affidavit the applicant, however, alleges that the first respondent's employment contract was terminated with effect from 5 August 2011. Having regard to what the first respondent said in his answering affidavit, the allegation that the contract had been terminated with effect from 5 August 2011 is in dispute.

Assuming that the applicant is correct as to the termination and the date thereof, the facts show that until at least 5 August 2011 the respondents had a right to reside in the house on the farm. The application was launched on 27 June 2011. On that date the employment contract had on the applicant's own version not been terminated yet and the respondents' right of residence in the house was still in force. It follows that when the application was launched the applicant had no cause of action for an order to terminate even the respondents' limited control over the house on the farm. On that basis the application must be dismissed.

I have decided nevertheless to consider whether the applicant should not be granted some sort of relief on the basis that the employment contract was terminated on 5 August 2011. Two difficulties stand in the way of such a course.

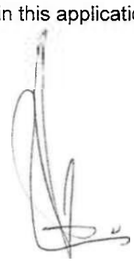
First, the applicant did not seek such relief based on facts that took place only after the application had been launched. Second, and more fundamentally, the allegation that the employment contract was terminated only appears in the replying affidavit and is in dispute. On the papers before this court it cannot be held that the contract of employment and the right of residence had been terminated on 5 August 2011.

It follows that the application cannot succeed. A note of warning to the respondents may not be out of place, however. In their opposing papers they unequivocally state that their right of tenure is dependent on the continuation of the first respondent's employment contract. If the contract had in fact been terminated, as to which this court is unable to express a view, the respondents would be well advised not to attempt to resume residence on the farm.

The order of 17 June was made pending the outcome of this application and the costs of that application were reserved for determination by this court. The papers in that application are not before me. In the circumstances the just course is to let those costs also follow the event in this application.

In the result the following order is made:

The application is dismissed with costs.



B.R. du Plessis

Judge of the High Court

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