

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **DODSON J**

CASE NUMBER: LCC 25R/00

MAGISTRATE'S COURT CASE NUMBER: 1126/00

Decided on: 19 April 2000

In the review proceedings in the case between:

LUSAN PREMIUM WINES (PTY) LTD

Applicant

and

JOHAN STOFFELS

First Respondent

FRANCINA STOFFELS

Second Respondent

BERNADIEN STOFFELS

Third Respondent

JUDGMENT

DODSON J:

[1] This application was referred to the Land Claims Court on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act.¹ I will refer to it as “ESTA”. The applicant carries on the business of a wine estate. The first respondent was previously employed by the applicant as a farm worker. The second respondent is his wife and the third respondent is his daughter. She is a minor. The first respondent was entitled, in terms of his employment contract, to occupy certain premises at Stellenzicht Village (New Block), House Number 14, Stellenzicht Vineyards, Blaauwklippen Rd, Stellenbosch (I will refer to them as “the premises”) with his wife and daughter. On 20 August 1999 the first respondent’s employment was terminated on the grounds of absenteeism after a disciplinary enquiry. His right of residence was terminated and he was given notice to vacate the premises by 30 September 1999. Proceedings to challenge the fairness of his dismissal before the

1 Act 62 of 1997.

Commission for Conciliation, Mediation and Arbitration² were resolved in the applicant's favour when the first respondent failed to appear at the hearing which had been convened to consider the matter. The respondents have not vacated the premises.

[2] After giving the statutory notices required by section 9(2)(d)(i) to (iii) of ESTA,³ the applicant filed an application for an order of eviction against the respondents with the clerk of the Stellenbosch Magistrate's Court on 25 February 2000. It is clear from the application that the applicant proceeds on the basis that the respondents are "occupiers" as defined in ESTA and therefore any eviction of the respondents can only be effected in terms of ESTA. The respondents did not oppose the application. The matter was set down for hearing on 16 March 2000. A full court roll meant that the application could not be heard on that day and it was postponed until 31 March 2000. On 31 March 2000, after hearing argument from the applicant's attorney, the magistrate found that all the requirements of ESTA had been complied with and he made an order of eviction against the respondents in accordance with section 12 of ESTA. He then forwarded the matter to this Court for review in terms of section 19(3).

[3] Before conducting any review, it is necessary to establish whether this Court has jurisdiction. At the time that these proceedings were commenced, section 19(3) read:

"Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted *on or before 31 December 1999*, shall be subject to automatic review by the Land Claims Court which may . . . (the various forms of order which may be made pursuant to a review are then listed)." (my emphasis)

However, on 24 March 2000, the Land Affairs General Amendment Act, 2000,⁴ came into force. I will refer to it as "the amendment Act". Section 11(a) of the amendment Act deleted the reference to "31 December 1999" and substituted "a date to be determined by the Minister and published in the Gazette". Section 14 of the amendment Act provides that -

2 Established in terms of section 112 of the Labour Relations Act 66 of 1995.

3 These provisions are quoted in paragraph [5] below.

4 Act 11 of 2000.

“Section 11(a) shall be deemed to have come into operation on 1 January 2000”.

It is clear from section 14, that section 11(a) is meant to apply retrospectively. The reference to the day immediately after 31 December 1999 suggests that the legislature wished to create seamless continuity of the Court’s review jurisdiction by way of the retrospective provision. There is a presumption of statutory interpretation against retrospectivity which is referred to below in more detail. Even if this presumption was applicable to a provision like section 11(a), section 14 clearly overrides the presumption.

[4] There remains the difficulty that the Minister has not yet determined and published a date in accordance with the amended version of section 19(3) of ESTA. I raised this issue with the applicant’s attorneys and the magistrate when inviting them to make written submissions⁵ for purposes of this review. The applicant’s attorney argued (in effect) that the failure to determine a date suspended the extension of the review jurisdiction contemplated by section 11(a) of the amendment Act. I do not agree. It is clear from section 14 of the amendment Act and from the long title to the amendment Act, that its purpose is to extend this Court’s automatic review jurisdiction.⁶ The mechanism chosen in place of a fixed date was, in my view, to allow the review jurisdiction to extend indefinitely until such time that the Minister formed the view that it was appropriate to terminate it. This would also avoid the necessity for repeated amendments. Her failure to determine a specific date is consistent with an interpretation which has the effect of extending the review jurisdiction indefinitely. Authority for an approach which recognises the efficacy of ESTA despite an outstanding determination by a Minister is to be found in the case of *Lategan v Koopman*.⁷ That case related to the income limit in the definition of “occupier” in ESTA which had not yet been determined. This Court was prepared to apply the definition despite the fact that the Minister had not yet determined the limit. I am accordingly satisfied that I have review jurisdiction.

5 Further reasons in the case of the magistrate.

6 The relevant portion of the long title reads:

“to extend the period for the review by the Land Claims Court of eviction orders by magistrates’ courts . . .”

7 [1998] 3 All SA 603 (LCC); 1998 (3) SA 457 (LCC) at para [4].

[5] The prerequisites for an order of eviction in terms of ESTA are set out in section 9(2). It reads:

- “(2) A court may make an order for the eviction of an occupier if-
- (a) the occupier's right of residence has been terminated in terms of section 8;
 - (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
 - (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
 - (d) the owner or person in charge has, after the termination of the right of residence, given-
 - (i) the occupier;
 - (ii) the municipality in whose area of jurisdiction the land in question is situated; and
 - (iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes,

not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.”

I am satisfied that the magistrate was correct in finding that there was compliance with paragraphs (a), (b) and (d) of section 9(2). However I am not satisfied that the applicant has shown that there has been compliance with section 9(2)(c) for a reason which I will explain below.

[6] In order to satisfy section 9(2)(c) of ESTA one must comply with either section 10 or 11. In the context of this case, where the respondents became occupiers after 4 February 1997, section 11 applies. Section 11 reads as follows:

“11 Order for eviction of person who becomes occupier after 4 February 1997

(1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.

(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.

(3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to-

- (a) the period that the occupier has resided on the land in question;
- (b) the fairness of the terms of any agreement between the parties;
- (c) whether suitable alternative accommodation is available to the occupier;
- (d) the reason for the proposed eviction; and
- (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.”

The present matter falls under section 11(2) in that the respondents’ occupation was indefinite, but linked to the first respondent’s ongoing employment relationship with the applicant. A court dealing with eviction proceedings to which section 11 applies, must apply its mind to each of the five factors listed in paragraphs (a) to (e) of section 11(3).⁸

[7] On the law as it was before the amendment Act, I am satisfied that the magistrate properly applied his mind to all of these five factors, particularly if regard is had to the robust approach to review applications which was suggested by Gildenhuis J in *Lategan v Koopman*.⁹ However, section 10 of the amendment Act introduced a new subsection (3) into section 9 of ESTA. It reads as follows:

- “(3) For the purposes of subsection (2)(c), the Court must request a probation officer contemplated in section 1 of the Probation Services Act, 1991 (Act No. 116 of 1991), or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period-
- (a) on the availability of suitable alternative accommodation to the occupier;
 - (b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;

8 *De Kock v Juggels and Another* 1999 (4) SA 43 (LCC) at para [22]; *Albertyn and Another v Bhekaphezulu and Others* 1999 (2) SA 538 (LCC) at para [5].

9 Above n 7 at paragraph [11]. He said:

“Die hof moet as uitgangspunt bepaal of geregtigheid geskied het. Sodoende sal die hof ‘n breë benadering volg, en die bevinding van die landdros nie so nougeset onder oë neem as wat by ‘n appél die geval mag wees nie.”

- (c) pointing out any undue hardships which an eviction would cause the occupier; and
- (d) on any other matter as may be prescribed.”

That amendment came into force on 24 March 2000. According to the magistrate, he and the applicant’s attorney were unaware that the amendment had been promulgated when the matter was heard on 31 March 2000 and the subsection was not applied. The subsection is expressed in peremptory terms. Such a report may well have raised information which was relevant to the five factors referred to in section 11(3). If the magistrate was obliged to apply it, then his order must be set aside and referred back to the magistrate’s court to enable him to do so. Whether or not he was obliged to apply it depends on whether the amendment affects pending proceedings.

[8] The applicant’s submission was that because of its procedural nature, the amendment (ie section 9(3)) did not apply to this application. No authority was cited for this submission. I understand the law to be the other way around. The case which has been referred to most often in this regard is *Curtis v Johannesburg Municipality*.¹⁰ Innes CJ states the “general rule” as follows:

“ . . . in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially . . . they should, if possible, be so interpreted as not to take away rights actually vested at the time of their promulgation.”¹¹

However, he then goes on to qualify this statement in relation to statutes affecting procedure -

“Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation, *and even though the suit may have been then pending*. To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective. Whether the expression is an accurate one is open to doubt, but it is a convenient way of stating the fact that every alteration in procedure applies to every case subsequently tried, no matter when such case began or when the cause of action arose.”¹² (my emphasis)

[9] On my reading of the relevant authorities, this basic statement of the law still holds good, subject to certain qualifications expressed in decisions of the Supreme Court of Appeal (and its predecessor)

10 1906 TS 308.

11 *Curtis* above n 10 at 311.

12 *Curtis* above n 10 at 312.

which are dealt with in paragraph [10] below. The only Supreme Court of Appeal decision which, at one point in the judgment, seems to run contrary to *Curtis* is *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others*¹³ where the following is stated:

“What is the correct approach in cases such as the present, where the action was instituted or the application was initiated *before* the amending legislation came into being?

The rule is that unless a contrary intention appears from the amending legislation, the existing (old) procedure remains intact. This was laid down in *Bell v Voorsitter van die Rasklassifikasieraad en Andere*.”

This can be read as running counter to the second of the extracts from the *Curtis* decision and as supporting the applicant’s submission. However, the statement in *Unitrans* must be read in context. The *Bell* case¹⁴ was one where not to follow the “old procedure” would have had the effect of depriving certain interested parties of an important vested right, namely, the right to be heard in proceedings under the old Population Registration Act 30 of 1950 relating to racial classification.¹⁵ It is clear that in *that* category of cases, ie where following the newly prescribed procedure would impair vested rights,¹⁶ the old procedure must be followed in pending proceedings in the absence of a contrary intention in the amending legislation. That the *Unitrans* decision was not meant to change the law is apparent from the fact that the Court cited with approval other Supreme Court of Appeal cases, such as *Minister of Public Works v Haffjee NO*,¹⁷ which have followed *Curtis*, subject to the qualifications to which I will refer below. The result in the *Unitrans* case is also consistent with the “qualified *Curtis* approach”. Kentridge AJ also accepted *Curtis* as a correct statement of the law in *S v Mhlungu and Others*¹⁸ where he said:

13 1999 (4) SA 1 (SCA) at 8C.

14 1968 (2) SA 678 (A).

15 This is made clear in *Bell*, above n 14, at 684E.

16 See paragraph [10](ii).

17 1996 (3) SA 745.

18 1995 (3) SA 867 (CC).

“There is a different presumption where a new law effects changes in procedure. It is presumed that such a law will apply to every case subsequently tried 'no matter when such case began or when the cause of action arose’”¹⁹

[10] As I indicated, the statement of the law in *Curtis* is subject to certain qualifications.²⁰ These may be summarised as follows:

- (i) The interpretation of any potentially retrospective provision or amendment is still subject to the overriding consideration that all the normal principles of interpretation must be applied to that particular statute to establish what is intended. If, on this basis, it is clear that the provision is not meant to apply to pending proceedings, that clear meaning will prevail.²¹
- (ii) The terms “procedural” and “substantive” in this context may be misleading. A provision which regulates procedure, may do so in a way which impairs or destroys vested rights. Such a provision should not be applied to causes of action which are established, or proceedings which are pending, at the time when the statute is promulgated, unless that is the clear meaning of the statute.²² Because of this it has been argued that there is no point in the procedural/substantive enquiry. The only question should be whether or not the provision affects vested rights.²³ However, provided that the caveat referred to in this subparagraph is borne in mind, it seems to me that the distinction is still conceptually useful.²⁴

19 At 897H. His judgment was a minority judgment, but Mahomed J in the majority judgment, says at 876C to D, with reference to this and other presumptions referred to by Kentridge AJ, that he has “no difficulty with [Kentridge’s] views on the content of these presumptions”.

20 *Minister of Safety and Security v Molutsi and another* 1996 (4) SA 72 (A) especially at 90 F to J.

21 See, for example, *Curtis* above n 10 at 319 and *Euromarine International of Mauren v The Ship Berg And Others* 1986 (2) SA 700 (A) at 709H to 710I.

22 See, for example, *Minister of Public Works v Haffejee* above n 17 at 752A to 753C; *Unitrans* above n 13 at 7F to G.

23 *Mhlungu* above n 18 at 897I.

24 The distinction was employed on this basis by Marais JA in *Haffejee* above n 17 at 753B to C.

- (iii) Even a purely procedural provision which does not impair or destroy existing rights may impact so unfairly on a party if applied to pending proceedings that it must be concluded that the provision was not intended to apply to pending proceedings.²⁵ An example may be where the application of the statute to pending proceedings would render abortive procedural steps which have already been taken prior to the amendment.²⁶ However, if the clear meaning of the statute is that there must be an unfair impact, that meaning prevails.
- (iv) Where the statute concerned constitutes a *repeal* of an existing law, reference must also be made to section 12(2) of the Interpretation Act.²⁷ However, it seems that the Supreme Court of Appeal interprets the Interpretation Act as codifying and being consonant with the common law.²⁸

[11] Applying this analysis to the present matter, the provision is plainly one which is procedural, as the applicant concedes. It is not a procedural amendment which destroys or impairs the substantive

25 See, for example, *Unitrans* above n 13 at 9H to 10E.

26 *Unitrans* above n 13 at 10C to E.

27 *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A) at 551A to 551G. The reference for the Interpretation Act is Act No 33 of 1957. The subsection reads:

“(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.”

Another example of the application of the Act in this context is *Haffejee* above n 17 at 755E to 756B.

28 *Haffejee* above n 17 at 755E to 756B.

rights of any of the parties. The application of the newly introduced section 9(3) to the present proceedings by the magistrate would not unfairly have rendered abortive any of the steps which had already been taken in the case. It may have resulted in a further postponement of the application with attendant additional costs, but I do not consider that so harsh a consequence as to justify a conclusion that the provision was not meant to apply to pending proceedings. Possible cost implications were not enough to move the Supreme Court of Appeal to reject the application of a new procedure to a pre-existing cause of action in *Haffejee*.²⁹ The provision seems to me to fall squarely within that category which was contemplated by Marais JA in the *Haffejee* case when he said:

“If . . . substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply.”³⁰

[12] I accordingly conclude that section 9(3) applies to this application and ought to have been followed by the magistrate. In arriving at this conclusion, I have taken into account the fact that in relation to section 11(a) of the amendment Act, the legislature expressly provided for its retrospectivity in section 14. On the basis of the *expressio unius est exclusio alterius*³¹ maxim it could thus be argued that where the amendment Act wants retrospective application, it says so and it did not do so in respect of section 10 of the amendment Act.³² This type of argument strongly influenced the Supreme Court of Appeal in deciding that a section of the Prevention of Organised Crime Act³³ was not intended to have retrospective effect in *National Director of Public Prosecutions SA v Carolus and Others*.³⁴ However, I am not persuaded by this argument in relation to this matter for the following reasons:

29 Above n 17.

30 *Haffejee* above n 17 at 754J to 755E

31 Which means “Expression of one thing is the exclusion of the other”. Hiemstra and Gonin *Drietalige Regswoordeboek, Trilingual Legal Dictionary* 3rd ed (Juta, Cape Town 1992) at 188.

32 Section 10 introduced section 9(3) of ESTA.

33 Act 121 of 1998.

34 [2000] 1 All SA 302 (A) especially at 316e to f.

- (i) In *Carolus* the court was concerned with a provision which could not be categorised as purely procedural. It potentially affected vested rights.³⁵ The strong presumption against retrospectivity therefore had to be taken into account in interpreting the provision. Section 9(3) of ESTA, on the other hand, does not affect vested rights. The application of section 9(3) to pending proceedings is therefore, in truth, a prospective application of the legislation, not a retrospective one.
- (ii) The courts have emphasised that excessive weight should not be given to the *expressio unius maxim*.³⁶ It is not a hard and fast rule.³⁷
- (iii) Section 14 was inserted, it seems, to ensure that cases commenced and decided in a magistrate's court between 1 January 2000 and 24 March 2000 would be subject to automatic review. By not including section 10 in the express retrospectivity provision, the potentially unfair consequence of imposing an obligation to apply section 9(3) of ESTA after a case has already been decided by a magistrate, is avoided. Instead, the result is that section 9(3) need only be applied to proceedings still pending before magistrates on 24 March 2000 and those commenced after that date.³⁸

[13] The magistrate cannot be criticised for not being aware of the promulgation of the amendment Act. The hearing was very soon after it came into force. But that cannot be a reason for holding that it does not apply to pending proceedings. The order of eviction accordingly stands to be set aside.

35 *Carolus* above n 34 at 316i to j.

36 See, for example, *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 16G; *Dettmann v Goldfain and another* 1975 (3) SA 385 (A) at 398E.

37 Du Plessis *The Interpretation of Statutes* (Butterworths, Durban 1986) at 156 and the authorities cited by him at footnote 43.

38 I leave open the question whether section 9(3) should be applied in proceedings which were decided in a magistrate's court before 24 March 2000, but are subsequently set aside by this Court on review.

[14] That said, there are some remarks which are called for in relation to the newly introduced section 9(3):

- (i) It is poorly drafted and ill-conceived in certain respects.
- (ii) Generally, a court only considers the matter on the hearing date after the parties have exchanged pleadings or affidavits. In terms of current procedure it is at this stage that a report is likely to be called for. This is far too late in the proceedings, particularly in application proceedings which ESTA encourages.³⁹ Compliance with the rules of natural justice will mean that the filing of further affidavits may have to be allowed in response to the report, thereby causing further costs and delays. Magistrates' courts may have to deal with this problem by instituting an arrangement whereby the report is called for as soon as a notice of motion or summons for eviction is issued out of the Court in terms of ESTA.
- (iii) It would have made far more sense if section 9(3) had required that the report be prepared at the stage when the authorities referred to in section 9(2)(d)(ii) and (iii) receive the notices contemplated by that section. The report could then be given to the parties before expiry of the two month period referred to in section 9(2)(d). This would be before the commencement of proceedings, so any response to the report could be included in the parties' affidavits or considered in pre-trial proceedings. This would also promote the settlement of cases. A voluntary scheme to this effect was suggested by this Court in *De Kock v Juggels*.⁴⁰
- (iv) The report procedure imposes substantial duties on two officials who already have their hands full trying to uphold an overstretched justice system, namely the magistrate and the probation officer. It would be far more sensible if the report had to be provided by the authorities on

39 See section 17(4) and the discussion contained in *De Kock* above n 8.

40 Above n 8.

whom there must be prior notice of the proceedings in terms of section 9(2)(d)(ii) and (iii). They are best qualified to provide the type of information sought.⁴¹

- (v) Linked to the problem in the previous paragraph is the possibility that delays in the furnishing of reports may unfairly delay the conclusion of legal proceedings. However, it may be that there would be sufficient compliance with section 9(3) where a magistrate has requested a report, specified a reasonable time period within which a report must be provided, this time limit has not been complied with and no good reason has been given for the non-compliance. A magistrate might then be able to proceed in the absence of the report. However, it is not necessary for me to decide this aspect now.
- (vi) Section 9(3)(c) creates the potential for a bias against the land owner in the report in so far as it only calls on the probation officer or other person preparing the report to identify hardships which might befall the occupier upon eviction. There is no corresponding duty to investigate hardships which might befall the land owner if the eviction is not granted. This is out of kilter with other provisions in ESTA which reflect a balance between the interests of owners and occupiers.
- (vii) It is unclear to precisely which of the three categories of potential reporters mentioned in section 9(3), the words “as may be determined by the Minister” are to be applied. Do the words apply to probation officers, Department of Land Affairs officers *and* to other officers in the employment of the State, or to only some of these categories? On the view I have taken of the matter, probation officers will generally be known to magistrates. It is therefore unlikely that a prior identification of probation officers is required by the Minister. Which of the other two categories of officers the words apply to, I need not decide here.

[15] I accordingly make the following order:

41 The Minister might still be able to achieve this to some extent using her power to designate certain officers in terms of the subsection.

- (i) the whole of the order made by the magistrate, Stellenbosch in this matter on 31 March 2000 is set aside;
- (ii) the matter is remitted to the Stellenbosch Magistrate's Court;
- (iii) section 9(3) of the Extension of Security of Tenure Act No 62 of 1997 must be complied with;
- (iv) in complying with paragraph (iii), the court must set a date which allows a reasonable period for the person preparing the report to submit the report;
- (v) the matter may then be set down for re-hearing;
- (vi) each party participating in the proceedings at the time of the re-hearing must have a proper opportunity to respond to any report obtained in terms of section 9(3).

JUDGE A DODSON

For the applicant:

Mr D Loxton of *Findlay and Tait, Cape Town*

No appearance for the respondent.