

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **Dodson J**

CASE NUMBER: LCC 33R/00

MAGISTRATE'S COURT CASE NUMBER: 151/98

Decided on: 10 July 2000

In the review proceedings in the case between:

KHUZWAYO, W

Plaintiff

and

DLUDLA, M

Defendant

JUDGMENT

DODSON J:

[1] This matter relates to an eviction order made by the Melmoth Magistrate's Court. It has been sent to the Land Claims Court for automatic review in terms of section 19(3) of the Extension of Security of Tenure Act.¹ I will refer to this Act as "ESTA."

[2] The plaintiff's particulars of claim in the action read as follows:

"1.

Plaintiff is WILCOX KHUZWAYO an adult male person who resides at MFANEFIL AREA, MELMOTH.

2.

Defendant is MGULULENI DLUDLA an adult male person who resides at SUB 14 of the FARM WILHELMINA NO. 6122 situate in the Province of KWAZULU-NATAL, in extent of two hundred and forty two comma six five seven three (242,6573) hectares, which is more fully described in the annexure hereto and where is next to MANZINI ESTATE, MELMOTH VILLAGE.

3.

Plaintiff is the owner of the land situate within the area of jurisdiction of the above Honourable Court and which is more fully described in annexure "A" hereto read with paragraph 2 above.

4.

Defendant is in wrongful and unlawful possession of the said property.

5.

Despite demand having been made Defendant fails, neglects or refuses to vacate the said property.

1 Act 62 of 1997.

WHEREFORE PLAINTIFF prays for . . . ejectment of the Defendant . . .”

[3] Attached to the particulars of claim is a copy of a deed of transfer which confirms that the plaintiff is the owner of the property concerned.

[4] The defendant gave notice of his intention to defend the action and filed a plea, the material parts of which read as follows:

“2.

Defendant is Mgululeni Dlodla an adult male person who resides at Wilhemina or Arcadia Farm situated in the province of Kwazulu Natal.

3.

Defendant denies emphatically that plaintiff is the owner of the land in which defendant resides and so, defendant put plaintiff to proof hereof.

4.

Defendant denies having wrongfully and unlawfully possessed the said property and defendant further puts plaintiff to proof hereof since these allegations are unfounded.

5.

Defendant has not been demanded by plaintiff to vacate the said property and in the circumstances plaintiff’s content of this statement is untrue and incorrect.”²

[5] The plaintiff then applied for summary judgment. Despite having filed a plea, the defendant did not file an affidavit opposing the application for summary judgment and did not appear at court to oppose the application. Summary judgment was granted.

[6] The introductory part of section 19(3) of ESTA provides as follows:

“Any order for eviction by a magistrate’s court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, shall be subject to automatic review by the Land Claims Court . . .”

The Court has adopted a generous approach to the ambit of its jurisdiction in terms of this provision. Thus in *Skhosana and others v Roos t/a Roos se Oord and Others*,³ Gildenhuys J said the following regarding section 19(3):

2 Both sets of pleadings are directly transcribed. The errors are in the original documents.

3 Reported as *Skhosana v Roos* in [1999] 2 All SA 652 (LCC).

“Where, in an action for eviction under common law, the defendant raises a defence based on ESTA and the magistrate finds that ESTA is not applicable and grants the eviction order, must the magistrate send the order to the Land Claims Court for automatic review? On a narrow interpretation of ‘in terms of this Act’ it will not be necessary, because the eviction order was made under common law. However, the legislature in providing for the automatic review of ESTA cases clearly intended that the Land Claims Court must scrutinise the records of those cases to ensure that the provisions of ESTA were correctly applied. It would be absurd if, on the one hand, an eviction order made under the provisions of ESTA has to be reviewed by this Court while, on the other hand, an eviction order under common law consequent upon a decision that ESTA does not apply, is not subject to such review.”⁴

[7] Later in the judgment he makes the following general statement regarding jurisdictional provisions in ESTA which use the formula “in terms of this Act”:

“Having regard to ESTA as a whole and taking into account its purpose and scope, I have come to the conclusion that the phrase ‘in terms of’, where used in the sections of ESTA from which this Court derives its jurisdiction, must be interpreted in a manner which will entitle this Court to adjudicate in a case where the provisions of ESTA are at issue. So interpreted, the phrase ‘in terms of this Act’ will mean ‘within the sphere of law established by this Act’. That does not mean that this Court will have jurisdiction to decide every issue which might arise in such cases. The issue must have some relationship with ESTA. Where the boundaries lie, I will not venture to determine. . . . Because this review application is brought on the basis that the second respondent committed an irregularity by striking the rescission application from the roll when it appeared from the application that the applicants wanted to raise a defence under ESTA, and because it was argued that the default judgment should not have been granted by the third respondent in that the applicants were protected against eviction by ESTA, and because this Court has jurisdiction to adjudicate on issues falling within the sphere of law established by ESTA, I hold that this Court has jurisdiction to adjudicate on the review application.”⁵

[8] In order to determine whether I have jurisdiction in this matter, I must be satisfied that it falls “within the sphere of law established by [ESTA]”. The sphere of law established by ESTA is the control over the evictions of a certain class of rural tenants described as “occupiers” and defined in ESTA as follows:

“a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-

- (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996);
- (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

4 *Skhosana* above n 3 at para [12].

5 *Skhosana* above n 3 at para [18].

- (c) a person who has an income in excess of the prescribed amount;”⁶

The “land” to which the definition refers, is described in ESTA as -

“... all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including-

- (a) any land within such a township which has been designated for agricultural purposes in terms of any law; and
- (b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.”⁷

[9] Scrutiny of the pleadings reveals that the plaintiff certainly did not bring the action on the basis of a concession that the defendant was an “occupier” whom he sought to evict in terms of ESTA. He proceeded on the basis of the simple averments required for the common law owner’s remedy of the *rei vindicatio*.⁸ The defendant in turn raised no defence which sought to rely on the protection afforded an “occupier” by ESTA. There have been no subsequent proceedings which have sought belatedly to raise a defence based on ESTA as was the case in *Skhosana* and in *Mahlangu and Another v Van Eeden and Another*.⁹ Nor are there any statements in the particulars of claim or the plea which might point to the possible application of ESTA, save to the extent that the property concerned is described as a farm. The fact that a property is described as a farm does not necessarily mean that it has not been proclaimed as a township. In *Skhosana*, Gildenhuis J held that in circumstances where the defendant wishes to defend an action, brought on the basis of the *rei vindicatio*, on the grounds that he or she is a protected occupier under ESTA, the defendant bears the onus to prove that he or she complies with all components of the definition of “occupier”.¹⁰

6 The definition is contained in section 1 of ESTA. The prescribed amount is R5000.00 per month. See Regulation R1632 Government Gazette 19587, 18 December 1998.

7 Section 2(1) of ESTA.

8 The legal action by which an owner recovers exclusive possession or occupation of his or her property.

9 LCC 53/99, 2 June 2000, internet web site http://www.law.wits.ac.za/lcc/2000/53_99sum.html.

10 *Skhosana* above n 3 at para [26].

[10] Even if one assumes that the property is land falling within the scope of ESTA,¹¹ there are no other pointers to suggest that the defendant may be an “occupier”. With reference to the definition of that term, I do not even know from the defendant’s plea if he concedes that the property belongs to another person or if he claims to have had consent (as defined in ESTA¹²) to reside on the property. The attorneys who appear to have come to represent the defendant after judgment was granted, have contended that the Court ought to assume jurisdiction in terms of section 19(3) of ESTA because the Court did so in the case of *Atkinson v Van Wyk and Another*¹³ where the plaintiff had obtained default judgment on the basis of similar particulars of claim. However, in that case, the magistrate had, of his own accord, called on the plaintiff’s attorney to satisfy him that ESTA was not applicable. The plaintiff’s attorney did not object to this procedure. He filed a certificate which supplemented the particulars of claim and purported to set out the basis for the non-applicability of ESTA. Instead, the averments contained in the certificate tended to confirm that ESTA applied. The effect of that sequence of events was, in my view, to bring the matter within the sphere of law established by ESTA.¹⁴ Nothing similar happened here. Nor was there any duty on the magistrate to make an enquiry. In *Skhosana*, Gildenhuys J said, referring to *Director of Hospital Services v Mistry*¹⁵ and then specifically to *Atkinson*,

“A judicial officer must decide a case on the issues raised by the parties. His failure to raise or consider the possibility that the applicants could be occupiers under ESTA before granting default judgment against them is not irregular.”¹⁶

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- 11 See in this regard the presumption in section 2(2) of ESTA, which reads:
“Land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved.”
Whether it is applicable in circumstances where the plaintiff does not bring the proceedings in terms of ESTA and no defence is raised in terms of ESTA is open to question.
- 12 Consent is defined as follows:
“‘consent’ means express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, includes the express or tacit consent of such holder;”
- 13 1999 (1) SA 1080 (LCC).
- 14 See also Keightley “The Impact of the Extension of Security of Tenure Act on an Owner’s Right to Vindicate Immovable Property” (1999) 15 *South African Journal of Human Rights* 277 at 291 fn 55.
- 15 1979 (1) SA 626 (A).
- 16 *Skhosana* above n 3 at para [27].

[11] In the circumstances, I am not satisfied that the Land Claims Court has jurisdiction. In coming to this view, I have taken into account the argument discussed by Keightley in her article entitled *The Impact of the Extension of Security of Tenure Act on an Owner's Right to Vindicate Immovable Property*¹⁷ that the effect of ESTA, perhaps read with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹⁸ (which I will refer to as "PIE"), is to override the effect of cases such as *Chetty v Naidoo*¹⁹ in the context of rural evictions. The effect of *Chetty v Naidoo* is that an owner seeking to rely on the *rei vindicatio*, need only plead that he or she is owner and that the defendant is in occupation of his or her property, to make out a case for eviction. It is then up to the defendant to raise a defence which justifies that occupation, unless the plaintiff's pleadings disclose that the defendant had a right of occupation.²⁰ The argument discussed by Keightley is to the effect that an owner of rural land now bears the onus to show compliance with either ESTA or PIE or to show that neither applies. If that was the law, the pleadings in this matter would have been deficient by reason of the failure to allude to ESTA or PIE and that might have formed a basis for this Court to assume jurisdiction.

[12] However, this argument stands to be rejected, both because of the problems with the argument identified by Keightley in her article²¹ and because that argument was effectively rejected in *Skhosana*.²² I am bound by that decision, which was a decision of two judges of this Court. In that case, the particulars of claim were also based on the *rei vindicatio*. There Gildehuys J said:

17 Above n 14 at 292-307.

18 Act 19 of 1998.

19 1974 (3) SA 13 (A).

20 In which event, the plaintiff must show termination of that right, unless the defendant justifies his or her occupation on the basis of a different right. *Chetty v Naidoo* above n 19 at 20C.

21 Keightley above n 14 at 293-295.

22 Above n 3 at paras [24] - [26].

“In the present case, the first respondent was fully entitled to formulate the particulars of claim in his action for eviction the way he did. There was no need for him to make any allegations relating to ESTA.”²³

[13] It is so that the consequence of this is that persons who are in fact occupiers but fail to defend eviction proceedings brought in terms of the common law remedy of the *rei vindicatio* are vulnerable to eviction in contravention of ESTA. That is an unfortunate consequence of the adversarial system of justice which prevails in this country. Remedying the problem requires legislative intervention, possibly by way of the extension and improvement of the reporting requirement in section 9(3) of ESTA.²⁴ Ideally, the entire statutory and common law regime relating to evictions ought to be reviewed and dealt with by way of simplified and, as far as possible, uniform legislation. The current situation, with a range of different statutes²⁵ applicable in different areas and conferring jurisdiction on different courts against the backdrop of a variety of potentially relevant constitutional provisions,²⁶ is fraught with uncertainty and the potential for injustice.²⁷

[14] I decline to exercise this Court’s review jurisdiction in terms of section 19(3) of ESTA and make no order.

JUDGE DODSON

For the plaintiff:

23 *Skhosana* above n 3 at [27].

24 For a criticism of section 9(3) see *Lusan Premium Wines (Pty) Ltd v Stoffels and others* [2000] 2 All SA 368 (LCC) at para [14].

25 Primarily ESTA, PIE and the Land Reform (Labour Tenants) Act 3 of 1996.

26 For example, sections 25(1), (5), (6), (8), 26, 28(1)(c) and 36 of the Constitution of the Republic of South Africa Act 108 of 1996. The cases of *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another*, LCC 44R/00, judgment delivered 07 July 2000, as yet unreported; *Ross v South Peninsula Municipality* 2000(1) SA 589 (C) and *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* case number 1736/00, Witwatersrand Local Division, judgment delivered 28 April 2000 illustrate the difficulties to which the constitutional provisions give rise in the absence of clear, uniform legislation.

27 Keightley above n 14 at 301.

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For the defendant

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