

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **BAM AP**

CASE NUMBER: LCC 34R/01

MAGISTRATE'S COURT CASE NUMBER: 3160/00

Decided on: 14 May 2001

In the review proceeding in the case between:

CH DU PLESSIS BK

Applicant

and

ARENDSE, M

Respondent

JUDGMENT

BAM AP:

[1] This matter comes before me on automatic review in terms of section 19(3) of the Extension of the Security of Tenure Act¹ ("ESTA"). The record of proceedings was certified and forwarded by the Magistrate of Malmesbury who had ordered the eviction of the respondent.

[2] The applicant is a closed corporation represented by its sole member, A S du Plessis, is the owner of the farm Klein Kiesenbosch ("the farm") in the district of Malmesbury.

[3] The respondent is Maria Arendse, a 79 year old female pensioner residing on the farm together with her grandson, Ronnie Arendse, in a four roomed dwelling. She has resided on the farm since 1987 but is currently a labourer on a neighbouring farm, Rooidraai.

[4] The application before the Magistrate was launched by Notice of Motion supported by a founding affidavit by Mrs du Plessis with annexures relating to contentions made both procedural and substantive.

1 Act 62 of 1997, as amended.

[5] In the course of the proceedings the Magistrate ruled, and correctly so in my view, that a section 9(3)² report be furnished from a probation officer. This report was duly filed and formed part of the record of proceedings.

[6] The respondent was undefended and appeared in person in spite of commendable efforts on the part of the court and its officers to assist her in this regard. The case had to proceed without any answering affidavit filed on behalf of the respondent.

[7] According to the section 9(3) report that was filed, she clearly also did not have any formal education or capacity to cope on her own regarding legal procedures because “*sy het geen skool opleiding ontvang nie en het haar hele lewe lank die werk van 'n plaasarbeider verrig.*”³

[8] Mrs du Plessis, on the other hand, was well versed as to the applicant’s rights and on how and when to exercise them, as apparent from her affidavit. In addition she had expert legal representation.

[9] In this kind of scenario, which is of very frequent occurrence in eviction cases under ESTA, the court has a duty to consider, *inter alia*, whether or not it can be said the respondent had an *effective*

2 Section 9(3) states:

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

3 This can be translated as “ she did not receive any schooling and worked her whole life as a farm labourer.”

opportunity to make representations before the decision was made to evict her.’⁴ If such an effective opportunity was, for one reason or another, not forthcoming the court should be very reluctant in accepting the allegations in the founding affidavits of the applicant as established facts without scrutiny.

[10] Also in respect of general principles of evidence, the court should assiduously keep in mind that:

- (I) Allegations made in affidavits are not proven merely by being stated. In civil cases the allegations must be proved on a balance of probabilities.⁵ When there are no probabilities to balance, the court should find against the applicant who bears the *onus* of proof.⁶ This is especially the case where a final order is sought.
- (ii) Allegations made in affidavits are subject to the cautionary rules applying to *viva voce* evidence. Those relevant to this case include the adverse inferences to be drawn upon the uncorroborated evidence of a single witness; a witness who has an interest or bias adverse to the defendant; hearsay statements; failure to call available witnesses or obtain affidavits from them.
- (iii) Affidavits are used in interlocutory and urgent proceedings to obtain an interim order pending its confirmation or dismissal upon a return date after all the contentious issues have been thoroughly canvassed. Examples of such use in the practice of the High Court are in summary judgment and in provisional sentence proceedings. An example from ESTA is, in terms of section 15 where an interim order of eviction can be obtained to avoid an imminent danger of injury or danger to persons pending the results of proceedings to make it final.

[11] There is no indication on the papers that the Magistrate applied his mind to any of the above

4 Section (1)(e) of ESTA.

5 *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D.

6 *Selamolele v Makhado* 1988 (2) SA 372 (V) at 375.

principles and that he made an effort to determine the evidential cogency of the allegations in the applicant's founding affidavit critically. Indeed his "reasons for judgment" are nothing more than a *verbatim* repetition of the allegations themselves as will be demonstrated below. As will also be demonstrated the allegations are mechanically tailored to fit the specific requirements of those sections in ESTA that would exclude the respondent from its protection.

[12] It was common cause in this case that the respondent was a "long-term occupier". These are occupiers who have resided on the land in question for 10 years and have reached the age of 60 years.⁷

[13] The special protection accorded these long-term and elderly occupiers can be lost if it is proved that an occupier in this category has committed certain seriously unacceptable deeds, such as are contemplated under sections 10(1)(a), (b) and (c). Section 10(1)(a) provides that the occupier must have in the first place breached section 6(3) of ESTA in that she has:

- “(a) intentionally and unlawfully harmed any other person occupying the land;
- (b) intentionally and unlawfully caused material damage to the property of the owner or person in charge;
- (c) engaged in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or
- (d) enable or assist unauthorised persons to establish new dwellings on the land in question”

[14] Section 10(1)(b) provides that the occupier must have breached a material and fair term of her agreement with the owner or person in charge while the latter has complied with every term. In addition the occupier must have failed to remedy the breach despite being given a calendar notice in writing to do so.

[15] Section 10(1)(c) provides that the occupier must have committed such a fundamental breach of the relationship between her and the owner or person in charge that the relationship could not reasonably be restored and it is not practically possible to remedy it.

7 Section 8(4) ESTA

[16] The gravamen of the applicant's case as appears from section 9(2)(d)⁸ notices was that the respondent had breached a material and fair term of their agreement. In the applicant's founding affidavit, however, Mrs du Plessis attempted to cast the net wider so as to catch the provisions of section 10(1)(a) and 10(1)(c) as well. I will follow the sequence of the applicant's affidavit in reviewing the magistrate's findings.

[17] The agreement, though written and signed on 2 September 1999, is said to have been reached on 1 September 2000. The reason given as to why, after twelve years residence, it was found necessary to enter into a formal agreement was due to "*veranderde omstandighede*".⁹

[18] The salient terms of the agreement were :

- The respondent will pay a monthly rental of R25,00 payable on last day of every month;
- respondent to restrain her self from damaging the property of the applicant;
- respondent to restrain herself from causing harm to any other person/occupier on the premises;
- respondent to restrain herself from being a threat, menace and from scolding and swearing;
- respondent should not provide shelter to any unauthorised person;
- should any visitors wish to put up overnight at the respondent's place, permission should be obtained and
- respondent to see to it that no damage is caused to the property by any visitors.

[19] The Magistrate found that there was not any doubt that the agreement was fair. I disagree. In

8 There are several notices under this section with which applicant must comply setting out *inter alia* reason for termination of residence.

9 This can be translated to "changed circumstances".

the first place there are no obligations/duties binding on the applicant. In the second place the restraints put upon the respondent to receive visitors does not sit comfortably with sections 5 and 6 of ESTA which guarantee freedom of association and the right to receive *bona fide* visitors at reasonable times and for reasonable periods.

[20] In the very first allegation of breach of the agreement the applicant deposes to an incident (she does not state whether she has personal knowledge of it) when the respondent damaged almost 50% of the windows of her dwelling and did not replace them. The Magistrate promptly finds this to be established fact - “*sy het ongeveer 50% van haar woning se versters gebreek en weier om dit te herstel.*” And so, according to him, the requirements of section 6(3)(b) have been fulfilled i.e. intentionally caused damage to the property of the owner.

[21] The same pattern manifests itself in the treatment of each and every one of the allegations of breaches of the agreement. In respect of the allegation that unauthorised persons were accommodated by her, no basis is laid as to why they should be regarded as such.

[22] I was unable to find from the affidavit as a whole any concrete and reliable evidence of misconduct so serious as to take the respondent outside the protection accorded to her by ESTA.

[23] The Magistrate also found it to be an established fact that the respondent undermined the authority of the applicant and that through her actions created a security risk for all other occupiers. Both these propositions are *verbatim* repetitions from the affidavit. They are clearly not existing facts but the deponent’s opinion. To thus allege as factual such anticipations is improper and the court should not have made such a finding.¹⁰

[24] In the event I do not find it necessary to make comments relating to the observation or not of the

10 Ex parte Rautenbach, 1934(1) P.H.C.28.

“I think the attorneys should realise that they are not entitled to look into the future and decide what the future will be, and then state that, as a present thing in a surrender affidavit”. *Per* Greenberg, J.:-

procedural elements save to say these appear to have been adequately observed.

[25] I find that the respondent is still a ‘long term occupier’ in terms of section 8(4) of ESTA. Accordingly, the order of the Magistrate is set aside in its entirety.

ACTING PRESIDENT F C BAM

signed on 25 July 2001

For the applicant:

Mr DH Blackburn instructed by Basson Blackburn Ing, Malmesbury.

For the respondent:

In Person.

