IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT CAPE TOWN ON 21 MAY 2007
DECIDED ON 11 JUNE 2007

CASE NUMBER: LCC13/07

LEON BOSWORTH

Appellant

and

TRADEPROPS 106 (PTY) LTD

Respondent

JUDGMENT

Gildenhuys J and Pienaar A J

This is an appeal against an eviction order granted in the Magistrate's Court: Knysna.

The Facts

The respondent is the owner of the property described as Portion 92 of the farm Uitzicht No. 216, Division of Knysna. The property is 11, 7905 hectares in extent. It is commonly known as the Lake Brenton Holiday Resort.

The appellant occupies a mobile home standing on a demarcated portion of the premises known as Site 15. Up to 28 February 2005, his occupation was in terms of consecutive lease agreements concluded between the land owner and the appellant's wife. The appellant got divorced and his wife left. The latest lease agreement expired on 28 February 2005. The appellant remained in occupation.

The respondent instituted motion proceedings in the Magistrate's Court: Knysna for the eviction of the respondent. It relied on its ownership of the property. It followed the procedures prescribed in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (PIE).

The appellant defended the application. He alleged that he is an occupier as defined in the Extension of Security of Tenure Act, No. 62 of 1997 (ESTA) and that the Court may not make an order for his eviction unless there has been compliance with the provisions of section 9(2) of ESTA.

The Magistrate decided that the appellant is not an "occupier" as defined in ESTA and granted an order for his eviction. It is against this order that the appellant now appeals.

The issues

At the commencement of the hearing Mr Van der Merwe, who appeared on behalf of the respondent, informed us that the respondent opposes the appeal on the following four grounds:

a. the Land Claims Court has no jurisdiction to hear the appeal;
b. the appellant is not an "occupier" as defined in ESTA because the land he occupies is land within a township;
c. the appellant did not establish that his monthly income is less than R 5 000.00 and consequently he does not fall within the definition of an "occupier"; and
d. the occupation of the land by the appellant conflicts with the zoning of the property and is therefore illegal.

Jurisdiction of the Court to decide the appeal

Mr Van der Merwe submitted that this court has no jurisdiction to decide civil appeals from Magistrate's courts against eviction orders not made in terms of

ESTA. Section 19(2) of ESTA reads as follows:

‘‘19(2) Civil appeals from magistrates’ courts in terms of this Act shall lie to the Land Claims Court.”

This court will only have jurisdiction to hear this appeal if the eviction order by the Magistrate was made in terms of ESTA. Whether it was will depend on the meaning to be given to the phrase “in terms of”. In *Skhosana and Others v Roos t/a Roos se Oord and Others,* 2000 (4) SA 561 (LCC) this court held that the phrase “in terms of [ESTA]” means “within the sphere of law established by [ESTA]”. The same interpretation was followed by Dodson J in *Van Zyl NO v Maarman,* 2001 (1) SA 957 (LCC) at 964H-966B and also in *Khuzwayo v Dludla,* 2001 (1) SA 714 (LCC) at 716A-H.

In the *Skhosana* matter (*supra*), in the course of determining the ambit of the phrase “in terms of”, the jurisdiction of this Court to hear civil appeals was considered. The following *dictum* appears in the judgment at 566F-567A:

> “Section 19(2) of ESTA reads as follows:
>
> ‘Civil appeals from magistrates’ courts in terms of this Act shall lie to the Land Claims Court.’
>
> If the phrase ‘in terms of’ has a narrow meaning, the following anomaly can arise. If a plaintiff brings an action based on ESTA, the defendant pleads that ESTA does not apply, and the magistrate upholds the defence, the appeal will clearly lie to the Land Claims Court. On the other hand, if the plaintiff brings an action for eviction based on common law, the defendant pleads that the action cannot succeed because he or she

is an occupier protected from eviction under the provisions of ESTA and the magistrate finds that the matter lies outside the scope of ESTA, an appeal would, on a narrow interpretation of the phrase 'in terms of', have to be brought to the High Court. If the High Court, on appeal, finds that ESTA is applicable, the case may then have to find its way to a Court which has jurisdiction to issue orders under ESTA. The High Court (subject to some exceptions) has no jurisdiction to issue orders under ESTA."

An appeal from a Magistrate's Court in a case where the applicability and interpretation of ESTA is at issue will be "in terms of ESTA" and falls within section 19(2) of ESTA. This Court will then have jurisdiction to hear the appeal.

The above interpretation is reinforced by the provisions of section 9(1) read with sections 20(1) and (2) of ESTA. These sections read as follows:

"9(1): Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

20(1) The Land Claims Court shall have jurisdiction in terms of this Act throughout the Republic…

(2) Subject to sections 17(2) and 19(1), the Land Claims Court shall have the powers set out in subsection (1) to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution."

High Courts are courts contemplated in section 166(c) of the Constitution. Its jurisdiction in ESTA issues is excluded by section 20(2). If the appeal in this matter had to go to the High Court, the High Court would be required to decide on ESTA issues which are within the sphere of jurisdiction of this

Court. It would, so it seems to us, be pointless for the appeal to go to the High Court where the High Court has no jurisdiction to decide the ESTA issues.

Is the land in issue land within a township?

Section 2(1) of ESTA reads as follows:

> "2(1) **Application and implementation of Act**-
>
> (1) Subject to the provisions of section 4, this Act shall apply to 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, …"

Section 2(2) of ESTA reads as follows:

> "2(2) 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."

Because the interpretation and application of ESTA was at issue in the proceedings in the Magistrate's Court and is presently still at issue, the proceedings were "in terms of" ESTA (giving the words "in terms of" a broad interpretation). The presumption would thus apply.

Mr Van der Merwe submitted that on the papers before us, it has been shown that the property concerned falls within land recognised as a township. He submitted that whether a property is "recognised" as a township depends on a *conspectus* of factors, such as whether the property falls inside or outside the area of

jurisdiction of

a local authority, whether the owner pays municipal rates and taxes in respect of the
property and whether the owner receives municipal services. The property concerned falls within the area of jurisdiction of the Knysna local municipality, established under the Municipal Structures Act No. 117 of 1998 during August 2000.
The owner of the property pays rates and taxes and receives municipal services.
Another relevant factor, according to Mr Van der Merwe, is the zoning of the land. The property concerned is zoned "Resort I". We found no authority, and Mr
Van der Merwe did not refer us to any, in support of his submission that a court must
have regard to any of these factors when deciding whether a property is "recognised" as a township as envisaged in section 2(1)(a) of ESTA.

Despite being invited to do so, Mr Van der Merwe did not suggest any other factors
which might impact on whether land falls within a township or not.

The Land Survey Act No. 8 of 1997 defines "township" (for which a general plan would be required) as follows:

> " "**township**" means a group of pieces of land, or of subdivisions of a piece of land, which are combined with public places and are used mainly for residential, industrial, business or similar purposes, or are intended to be so used."

The previous Land Survey Act, No. 9 of 1927, contains the same definition. The procedure for the establishment of townships within the Republic differs from province to province. A common factor, however, is the preparation and registration of a general plan for the township. The term "general plan" is defined in the Deeds Registries Act No. 47 of 1937. The relevant part reads as follows:

> " "**general plan**" means a plan which represents the relative positions and dimensions of two or more pieces of land…"

There is no evidence that the property at issue in this case forms part of a

group of pieces of land or subdivisions of a piece of land which are combined with public places and are used mainly for residential, industrial, business or similar purposes, nor is there any indication that the cadastral boundaries of the property are shown on any general plan.

In *Ngwenya and Others v Grannersberger* 1999 (4) SA 62 (LCC), the Court held as follows:

> "Section 2(1) of ESTA excludes land in a township 'established, approved, proclaimed or otherwise recognised' from the operation of the Act. The adjectives 'established', 'proclaimed' and 'otherwise recognised' carry the connotation of a township which actually exists in law…"

We conclude that it has not been shown that the property concerned is land in an existing township, as envisaged in section 2(1) of ESTA.

<u>Does the appellant have an income in excess of R 5 000.00?</u>

The relevant portions of the definition of "occupier" in section 1(1) of ESTA read as follows:

> " "**occupier**" means 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) …
>
> b) …
>
> c) a person who has an income in excess of the prescribed amount."

The prescribed amount referred to in sub-par (c) is R 5 000.00. Persons earning in excess of R 5 000.00 per month are excluded from the definition. See *Esterhuyze v Khamadi* 2001 (1) SA 1024 (LCC) at 1029C-E.

In par 2 of the appellant's opposing affidavit in the Court *a quo*, the appellant stated:

> "I further confirm that I am currently a pensioner and that my only income is a state pension in the amount of R 820.00 per month."

In par 2.2 of the opposing affidavit, the appellant stated:

> "I confirm that my income is currently well below R 5 000.00, and that I use the property primarily for residential purposes."

In par 2.5 he stated:

> "As I previously stated, my only income is a state grant in the amount of R 840.00 per month."

Mr Van der Merwe pointed out that these statements are contradictory, and not supported by any written proof. He said that the appellant should have attached some written document confirming the monthly amount he receives from the state. It would have been prudent for the appellant to have done so. However, the fact that he did not do so does not have the result that the statements be disregarded. A confirming document is not a *probandum*; it

would only be a *probans*. Its absence will do no more than affect the evidentiary weight to be given to appellant's assertion of the amount of his income. See in this regard Schmidt, *Bewysreg*, 4th ed at 346-347.

The respondent in this appeal said that he has no knowledge of what the appellant receives from the state. The absence of documentary proof is, in the absence of some indication that it might be false, insufficient reason to reject his evidence. We are prepared to accept the appellant's statement that it is R 820.00 (or R 840.00) per month. In the result, the requirement relating to the income of an "occupier" as contained in sub-par (c) of the definition, has been complied with.

Does ESTA apply where an occupier's residence is unlawful?

Mr Van der Merwe submitted that the "Resort 1" zoning of the property does not allow permanent residence on the property. The appellant, so he argued, is a permanent resident on the property despite occupying a mobile home. Permanent residence contravenes the zoning restrictions applicable to the property and is a criminal offence under section 39(2) read with section 46 of the Land Use Planning Ordinance No. 15 of 1985.

We are not convinced that it has been established that the appellant's residence is in fact permanent residence. The appellant occupied the site in terms of several consecutive lease agreements of limited duration. For purposes of this case, we will accept (without so deciding) that permanent residence is not allowed, and that the appellant intended his residency to be permanent.

Section 9(1) of ESTA reads as follows:

> "9 **Limitation on eviction**-
>
> 1) Notwithstanding the provisions of any other law, an occupier may be

evicted only in terms of an order of court issued under this Act.

2) …"

The effect of this section is that, notwithstanding the provisions of any law which relate to eviction, an occupier's residency may only be terminated and an occupier may only be evicted in terms of a Court Order meeting the requirements of ESTA. Although the alleged illegality of the appellant's residence might well be a factor in deciding whether the prerequisites contained in section 10 or in section 11 of ESTA have been met, such illegality will not by itself render the provisions of ESTA inoperative.

In our view, the provisions of ESTA remain applicable irrespective of the legality or otherwise of the appellant's residence. It is common cause that the appellant's eviction application did not comply with ESTA. Consequently, the eviction order has no foundation in law.

It has been held by Selikowitz J in *City of Cape Town v Rudolph and Others* 2004(5) SA 39 (C) at 61B, that in eviction applications covered by PIE, an owner cannot avoid the peremptory provisions of PIE and rely only on common-law remedies to evict an occupier from land. The same applies to eviction applications within the sphere of law governed by ESTA.

Conclusion

In our view none of the submissions made by Mr Van der Merwe in support of the respondent's opposition to this appeal, although valiantly argued, can be accepted. It follows that the appeal must succeed.

In accordance with this Court's general practice not to make cost orders

(except in extraordinary circumstances), we will not make any cost order.

For the reasons aforesaid, we make the following order:

a. The appeal is upheld.

b. The order of the Magistrate's Court: Knysna is set aside and substituted by the following:

"The application is dismissed;

There is no order as to costs."

c. There is no order as to the costs of appeal.

_____
GILDENHUYS J

_____
PIENAAR A J

Appearances
For the appellant:

Mr J M Geyser

Legal Aid Board
George

For the respondent:

Mr D L Van der Merwe

instructed by
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