

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG
NCUBE AJ

CASE NUMBER: LCC 135/2007

Decided on: 30 January 2008

In the matter between:

TOM SAMUEL SIBEKO

1st Applicant

LINDIWE SIBEKO

2nd

Applicant

and

J. H. J. E. DE WET RAUTENBACHENT AND OTHERS

1st Respondent

SHERIFF AT VREDE

2nd Respondent

JUDGMENT

NCUBE A J:

1] This is an application for restoration of residence. The application is brought in terms of section 14(1) of the Extension of Security of Tenure Act 62 of 1997. The said Act shall be referred to hereinafter as “ESTA”. The application was brought ex-parte and on urgent basis. It is opposed.

1]

2] I indeed treated the matter as urgent. On 12 November 2007, I dispensed with the rules for and time limits relating to service of process. I ordered the first respondent to restore to the two applicants the residence and use of the land in question. I ordered the first respondent to repair, reconstruct or replace the buildings which he had destroyed. The

said order was to operate as a *Rule Nisi* returnable on 27 November 2007, the date on which the respondent was to show cause why the order could not be made final.

3]On 27 November 2007 and upon request of the parties, the matter was postponed to 13 December 2007 which is the date on which the application was fully argued. The judgment was reserved.

2]

4]The first applicant Tom Sibeko is the son of one Solomon Sibeko. Solomon Sibeko came to reside and work on the respondent's farm, Vastrap in 1983. The first applicant was 13 years old by then. Solomon had ten children and the first applicant was Solomon's sixth child.

3]

5]Solomon passed away in 1985. Japie Mcusi Sibeko took over as the head of the Sibeko family on the farm. Japie like Solomon also worked for the respondent on the farm till he died in 2003. Solomon and his wife were staying together with their ten children as one intact family unit on respondent's farm. Some of the children would go and work somewhere and return home on month ends and holidays as many Africans do. All Sibeko children regarded Vastrap farm as their home.

4]

6]At some stage, the first applicant left home to go and attend school somewhere but he always regarded Vastrap farm as his home, he had no intention to abandon his residence on the farm. According to the respondent, there was an agreement that when children reached the age of 18 years of age, they had to leave the farm. The existence of such an agreement is denied by the first applicant.

5]

7]Amongst the children of Solomon, there was a son by the name of Sifiso Johannes Sibeko. Sifiso was always in occupation of the Sibeko family home on the farm. Sifiso fell in love with a lady by the name of Thembi Selepe and they stayed together as husband and wife in Sibeko house at Vastrap Farm.

6]

8]Sifiso passed away in 2005. Before Sifiso passed away, the respondent in this matter had commenced with eviction proceedings in Vrede Magistrate Court sitting at Memel. In those eviction proceedings Sifiso was the first respondent and Thembi Selepe was the second respondent. The application for eviction before the magistrate was referred for oral evidence. Both the respondent and Thembi Selepe testified in those proceedings. The eviction order was granted in favour of the landowner.

7]

9]On 8 November 2007, the sheriff went to the applicants' house, he told the applicants to leave the premises immediately. The sheriff was in company of other people who dismantled the house, loaded sheets of corrugated iron, furniture, clothing and other household effects onto the truck. The truck was driven towards Zamani Township near Memel. It stopped next to the road and all the items were offloaded and dumped next to the road on a vacant site.

8]

10]On 9 November 2007, the respondent and his son came with a tractor and they started

pulling down the walls of the house and they burnt down the thatched houses. Both applicants were offered accommodation by neighbours whilst all their belongings remained in the veld exposed to rain and sun.

9]

11]It is important to note that the first and second applicants were not party to the proceedings before the Magistrate. The only people who were cited as parties were Sifiso Johannes and Thembi Selepi. By the time the order of the Magistrate was executed by the sheriff on 9 November 2007, Thembi Selepi had left the farm with her belongings. Sifiso Johannes was late by then.

10]

12]I turn now to deal with the order of the Magistrate. The order of the Magistrate reads as follows:

11]" i)Dat die 3de respondente en haar kinders sowel as vriende en familie wat op die plaas Vastrap die plaas tesame met hul vee en besittings ontruim en die applicant in besit daarvan gestel word.

12]

13]ii) *Ingevolge Artikel 12 (1) (a) van Wet 62 van 1997 word 26.7.2006 as 'n regverdige en billike datum beskou waarop die plaas ontruim moet word wees en gelaf die hof dat die derde Respondent haar kinders sowel as vriende en familie die Plaas moet ontruim voor 26 Julie 2006.*

14]iii) *Indien die derde respondent haar Kinders sowel as vriende en familie nie voor op 26 Julie 2006 die plaas ontruim het nie, word die 3de Augustus 2006 bepaal as die datum waarop die Balju die uitsettingsbevel moet uitvoer. Indien die Balju egter probleme ondervind om die bevel uit te voer kan by ook die Polisie versoek om hom by te staan om die uitsettingbevel uit te voer.*

15]

16]iv).....

17]

18]v) *Die applicant sal dan ook verantwoordelik wees om kosteloos al die respondente se besittings en vee te verskaf vanaf sy plaas na hulle nuwe heenkome. Die 3de respondent kan ook met haar saam neem die deure en vensterrame van die gebou wat sy tans bewoon. Sy kan ook die sinkplate neem wat ook insluit die 7 sinkplate wat die applicant aan die respondent geleen het.*

19]vi).....
 20]vii).....
 21]viii).....”

13]The eviction order was granted on the 19th of April 2006. The order was referred to the Land Claims Court for review purposes as envisaged in section 19(3) of ESTA. The eviction order was confirmed.

22]

14]In the proceedings before the Magistrate Thembi Selepe was referred to as the third respondent. For unknown reasons, Sifiso Johannes Sibeko was cited twice, as first and second respondent. The fourth respondent was Phumelela Municipality and the fifth respondent was the Department of Land Affairs.

23]

15]The Warrant of Ejectment in terms of which the eviction was carried out states as follows:-

24]‘WHEREAS the applicant obtained an order in the Magistrates Court Memel on the 19th April 2006 against Thembi Selepe, ordering her and all persons claiming through her, to be ejected from and out of the farm “ Vastrap”, subdivision 1 and 3 of the farm “Franshoek 606”, district Vrede, at present occupied by the said Thembi Selepe, as appears to as of record.

25]

26]NOW THEREFORE you are directed to eject the said Thembi Selepe and all persons claiming through her, her goods and possessions from and out of occupation and possession whatsoever of the said ground and/ or premises, and to leave the same, to the end that the said applicant and may peacefully enter into and possess the same, and for so doing this shall be your warrant”

27]

16]It is this warrant and court order which the respondent herein relies upon. Both the magistrate’s eviction order and the warrant of ejectment did not mention names of the two applicants. The warrant of ejectment is couched in words which are somehow different from the magistrates order. The court order refers to the third respondent, her children, friends and family. The warrant of ejectment refers to Thembi Selepi and all persons claiming through her¹

¹ My emphasis

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17]When the ejectment order was executed, Thembi Selepe had, on her own, left the farm. The only persons remaining on the farm were the two applicants herein. The respondent avers that the order of the court by necessary implication refers to the two applicants. The court order referred specifically to the 3rd respondent which was Thembi Selepi, her children, friends and family. The first applicant is the brother of Thembi's late husband Sifiso Johannes Sibeko. He is not Thembi's child and he is not her friend either. Can it be said that the first applicant is Thembi's family? The answer to this question would be in the negative. The first applicant is Sibeko. Thembi is Selepi. Thembi came to stay with Sibeko family because she was in love with the first applicant's brother. They were not married but they stayed together as husband and wife.

29]

18]Turning now to the second applicant Lindiwe Sibeko. Lindiwe is the daughter of one of the first applicants' brothers by the name of Mcusi Sibeko. Lindiwe is not Thembi's child, she is not her friend and she is not a member of Thembi's family. It is clear therefore that the magistrate order did not relate to the two applicants. It is not clear to me why the magistrate in his order made reference to Thembi's friends and family. Whatever the reason might have been, this could not possibly be reference to the applicants.

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19]The warrant of ejectment makes reference to Thembi Selepi and all those claiming through her. The two applicants are not claiming their right of residence on the farm through Thembi but they derive such a right from their association with Solomon Sibeko, the father of the first applicant and grandfather of the second applicant. It is clear therefore that even the warrant of ejectment did not refer to the two applicants.

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20]It was the duty of the sheriff to satisfy himself about the identity of the people he found at Sibeko's house. Warrants must be executed with caution and due regard to occupier's constitutional right to be treated with respect and dignity.

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21]The respondent avers that the two applicants were not resident on his farm on a continuous basis and for this averment, the respondent has relied heavily on the testimony of Thembi Selepi in court during eviction proceedings before the magistrate. The record of those proceedings has been placed before me. In my view, the evidence of Thembi Selepi cannot be relied upon to make a finding that the applicants were not resident on the farm. Thembi was somewhat evasive and could not answer even simple questions. Thembi told the magistrate she was staying with Lindiwe and her brother the first applicant. When asked as to when Lindiwe would return to Newcastle, she could not say. She was asked as for how long the brother was going to stay there to which she answered "*I do not know*". She was asked since when her brother (first applicant) had been staying with her to which she answered "*since the funeral of my late husband the first respondent*". At the same time Thembi testified in those proceedings and said

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34]"Sifiso's brother came to my house with a car. I live with my brother

and other girl in my house 'Vastrap' farm. The girl is just visiting she is residing in Newcastle"

35]

22]It is not clear why the first applicant would come with a car everyday if he was not staying there. During examination of Thembi by her attorney Mr. Mabotya the following questions were asked;

36] Question *"- your brother you are referring to, who is he?"*

37] Answer *"Thomas Sibeko"*

38] Question *"How are you related to him"*

39] Answer *"He is Sifiso's brother"*

40] Question *"Why is he staying with you?"*

41] Answer *"It is also his place"*²

42] Question *"are you employed?"*

43] Answer *"No"*

44] Question *"Do you have any source of income?"*

45] Answer *"Sifiso's brother gives me money"*

46]

47]After these answers the magistrate made a follow up and enquired why Thembi regarded the house she was staying in as also being Sifiso's brother's house to which she answered

48]"Because his parents also stayed there before they passed away"

49]

23]It is the respondent's case that the applicants were unlawfully resident on the farm. At one stage the respondent got a letter from his attorneys addressed to the applicants, ordering the applicants to vacate the farm within 24 hours. Both applicants did not heed the call to vacate the farm because that was not a lawful eviction. Section 26(3) of the Constitution³ prohibits eviction without due process of law.

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24]In my view both applicants were resident at Vastrap farm, they had their home there and the respondent was aware of their presence on the farm. The applicants might have been away from the farm but that alone does not suggest that they had abandoned their home. It often happens in African culture that a member of the family would leave the common household to work or stay somewhere without intention to abandon his or her home. A person may be away for as long a period as he chooses to be, but he knows where his home is and he returns home when he is on vacation or on week-ends. I have noticed that many landowners are labouring under a wrong perception that once a person has reached an age of majority, that person is no longer supposed to be on the farm if he is not working for the landowner, even if he or she is a child of the occupier.

51]

² My emphasis

³ Act 108 of 1996.

52][25] Maybe it is important to look at what is meant by the word “reside”. In **Barrie No vs. Ferris**⁴. Baker J expressed himself in the following terms:-

53]

54]“Reside means that a person has his home at the place mentioned. It is his place of abode, the place where he sleeps after the work of the day is done. The essence at the word is the essence of permanent home”.

55]

56]On the other hand the word “home” is commonly defined as:-

57]“Dwelling place, fixed residence of family or household, place where a thing is native or most common⁵”.

58]

59][26] Our constitution prohibits arbitrary eviction. Even an unlawful occupier cannot be summarily evicted from his place of residence⁶. Apartheid land regime allowed evictions and forced removals that left many black South Africans economically, politically and socially insecure. Land reform laws have been enacted to stop this practice and where possible, to reverse it⁷.

60]

61][27] I therefore find that the two applicants were not occupying through and under Thembi Selepi and that their eviction was unlawful. Although the sheriff was cited as the second respondent, no relief was sought against him and nothing was said about him in argument in court.

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63][28] In the circumstances the following order is made;

64]

1. The *Rule Nisi* granted on 12 November 2007 is confirmed.
2. The first respondent is ordered to restore to the two applicants the residence on and use of that portion of land which they resided on and used at Vastrap farm division of Franshoek 606 in the district of Vrede immediately before the eviction.
3. The first respondent is ordered to rebuild, reconstruct or replace any

⁴ 1987 (2) SA709.

⁵ The Concise Oxford dictionary of Current English 7th ed 1982 page 476.

⁶ See for instance the provisions of Prevention of Illegal Eviction Act 18 of 1998.

⁷ See Section 14 of ESTA; Agrico Machinery, Masjinerie (EDMS) Bpk vs. Swiers 2007(5) SA 305 (SCA).

building and or structure that was peacefully occupied or used by the applicants immediately prior to their eviction.

4. The first respondent is ordered to return to the applicants all furniture and other personal assets which were removed from the applicants' house on 8 November 2007.
5. No order is made against the second respondent.
6. There is no order as to costs.

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ACTING JUDGE T M NCUBE

For the applicants:

Matsepes Incorporated Attorneys

For the respondent:

Hatting Marais Attorneys