

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC 47R/2009

IN CHAMBERS

Decided on: 16 October 2009

In the matter between:

JACOBUS ALBERTUS SWART

Applicant

and

PIET KHONJI MAHLANGU

Respondent

JUDGEMENT

MIA A J:

- [1] This is an automatic review under section 19(3) of the Extension of Security of Tenure Act ("hereafter referred to as ESTA") of an order granted by the Additional Magistrate Ermelo on 4 June 2009. The order was for the eviction of the respondent from the applicant's farm being Portion 11 (Portion of Portion 7) of the farm Nelspan 449. The eviction order was granted in the absence of the respondent and his attorney of record.
- [2] The respondent moved to the farm with his family at the age of 16 years old and was employed by the previous owner Mr. Jan Bierman. The applicant leased the farm and later purchased the property and took over the employment relationship with the respondent. No written contract of employment appears to have been placed before the court indicating the terms of the agreement. The respondent resigned from employment after the applicant purchased the farm and obtained work at a garage in

Ermelo but continued to reside on the farm and accommodated his family there.

- [3] There appears to be a dispute regarding the termination of employment but to date no dispute has been referred to the CCMA or the labour court. The respondent also confirms in his answering affidavit that no moneys are due to him in terms of his employment relationship with the applicant. The respondent alleges constructive dismissal however no further facts are placed on record to support the above allegation. It also appears that some time has passed since the respondent resigned from employment and has not pursued the matter with regard to the allegation of the constructive dismissal.

- [4] For an eviction order to be granted there must be compliance with all the peremptory requirements in section 9(2) of ESTA. There does not appear to be proper compliance with the above section.

Non compliance with section 9(2) (a)

- [5] The applicant indicates that the first respondent's right to residence was terminated upon resignation from employment. Section 8 of ESTA reads as follows:

Section 8(2)

Termination of right of residence

(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-

- (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
- (b) the conduct of the parties giving rise to the termination;
- (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
- (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
- (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.
(3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.

- [6] The applicant avers that the respondent's right of residence was terminated as a result of the resignation of the respondent. In Landbounavorsingsraad v Klaasen¹ Gildenhuys J indicated at 417 C-E that:

"a specific cancellation of an occupier's 'right of residence' is required under section 9 (2) (a), even where the agreement from which the right is derived was cancelled or has expired by the effluxion of its time. Consent to an occupier to reside on the land may only be terminated in accordance with the provisions of s 8(1) or (2) of"ESTA".

Thus the applicant is required to notify the respondent that the applicant terminates the right of residence as he is entitled to do in terms of section 8(2) of ESTA. A notice to vacate was served on the respondent on 20 June 2008 based on the applicant's assumption that the right to residence was terminated automatically when the respondent resigned. A specific cancellation of the right of residence was required under section 9(2) (a). This was not done and I am unable to find compliance with this section.

Non Compliance with Section 9(2) (c)

- [7] The respondent was born in 1954 and moved on to the farm when he was 16 years old. He thus moved onto the farm in about 1970 and was an occupier on 4 February 1997. Section 10 of ESTA is thus applicable. In the present matter the consent to reside on the land was given by the previous owner and was never terminated by the previous owner. On the papers before the court it does not appear to have been terminated by the applicant either.

¹ 2005 (3) SA 410

[8] Section 10 of ESTA provides

Order for eviction of person who was occupier on 4 February 1997

- (1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-
- (a) the occupier has breached section 6 (3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
 - (b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice in writing to do so;
 - (c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or
 - (d) the occupier-
 - (i) is or was an employee whose right of residence arises solely from that employment; and
 - (ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.
- (2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.

[9] The magistrate relies on section 10(1)(d) for granting the order for eviction. The respondent argues that his right of residence arose prior to his employment with the applicant and that he moved onto the farm at age 16 years old with his family when Mr Bierman was the owner. The respondent has resided on the farm for approximately forty years. The applicant refers to the affidavits of Susan Bohmer, the daughter of the previous owner to support his statement regarding the respondent's employment with the previous owner and his right of residence. This affidavit does not form part of the papers. On the papers there thus appears to be a dispute as to whether the right of residence arose solely from the employment relationship. I have not had insight into the affidavit referred to which did not form part of the record before me and the dispute on the papers in this regard ought to have been referred to oral evidence. In light hereof I am unable to find compliance with this section.

[10] The probation officer has filed a report which states that “removal will not interfere directly with their schooling, although it may cause inconvenience”. There appears to be no assessment by the probation officer of the accommodation available in Ermelo referred to by the applicant and which it is alleged the respondent occupies. Section 10(3)(c)(i) states as follows:

(3) If-

- (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
- (b) the owner or person in charge provided the dwelling occupied by the occupier; and
- (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge, a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to-
 - (i) **the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and**
 - (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted. (my emphasis)

Further, I am not satisfied that the probation officer’s report furnished, addresses the question of the availability of alternative accommodation and the suitability thereof sufficiently. Section 10 (3) (c) (i) places a responsibility on the owner as well as the occupier to find alternative suitable accommodation. On the papers the applicant indicates that this is not his responsibility. It appears that neither the probation officer nor the applicant have had regard to this section. Thus I am unable to find compliance herein.

Non Compliance with Section 9(2) (d)

- [11] The return of service reflects that the notice of motion was served on 29 November 2008. Regulation 9(1) of the regulations prescribes the manner and form of service in terms of section 9 (2)(d). The prescribed form E was not used. A form which substantially complies with the form is permissible. The two calendar months notice period appears to have been complied with. However service was not effected on the occupier and the return of service does not reflect that a portion equivalent to the highlighted part of form E was read to the occupier or the person on whom service was effected in a language which he or she best understands and that a copy in the same language was delivered to the occupier or the person on whom service was effected. The regulation is peremptory and I am not able to find compliance herein.

ORDER

- [12] In the circumstances I am unable to confirm the eviction order and the following order is made:

- [1] The whole of the order made by the magistrate Ermelo under
Case Number 2550/2008 is set aside.

Acting Judge : SC Mia

LAND CLAIMS COURT

Appearances

Attorney for Applicant

Mr D Van der Walt

Danie van der Walt Attorneys

Ermelo

Attorney for Respondent

Mr. Mtsweni

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Ermelo