

# **IN THE LAND CLAIMS COURT OF SOUTH AFRICA**

## **HELD AT RANDBURG**

**CASE NO: LCC 58R/2009**

### **IN CHAMBERS**

**Decided on: 4 August 2010**

In the matter between:

**JAD PROPERTIES TRUST**

Applicant

**And**

**ELIAS MATHOTO TSHABALALA**

1<sup>st</sup> Respondent

**ELIAS MATHOTO TSHABALALA**

2nd Respondent

**DELIWE EMILY NHLAPO**

3<sup>rd</sup> Respondent

**MAKAMOHO MELITA TSHABALALA**

4<sup>th</sup> Respondent

**THOKOZILE JULIA TSHABALALA**

5<sup>th</sup> Respondent

**DIHLABENG LOCAL MUNICIPALITY**

6<sup>TH</sup> Respondent

**DEPARTMENT OF LAND AFFAIRS**

7<sup>th</sup> Respondent

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### **JUDGEMENT**

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**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 Magistrate Fouriesburg on 6 November 2008. The order was for the eviction of the respondents from the applicant’s farm being “ Delta”, No 358, District Fouriesburg, Orange Free State.

[2] The facts of the case are briefly that the first and fourth respondents were employed by the previous owner and all the respondents were living on the farm before the applicant purchased the farm. When the applicant purchased the farm he offered the first respondent employment offering a salary of R800 per month and a bag of mealie meal. The version of the applicant was that the mealie meal was delivered in the middle of the month when the employment was negotiated and the first respondent was paid a pro rata amount for the days worked. According to the applicant the first respondent absconded from work in the following month. He enquired about the first respondent and was informed that he was employed on the Rand. He then enquired when they would be vacating the premises. The first respondent's version was that he was offered R700 and a bag of mealie meal and told the cash portion would be negotiated again at the end of the month.

[3] The reviewing judge directed a query requesting reasons why respondents 2, 3, 4 and 5 were found to be occupiers in terms of section 8(1) and whether there was compliance with section 9(2) (a) of ESTA.

#### **“Occupiers”**

[4] The magistrate's response was that the respondents may be classified as occupiers in terms of sections 8(1), 8(2), 8(4) (a), 8(4) (b) and 8(5). He finds that on the evidence that they are all to be classified in terms of section 8(1) of ESTA.

He also accepts that there was compliance with section 9(2) (a) based on the oral evidence given by the applicant and his lessee.

[5] The definition of occupier is found in section 1 of ESTA and reads 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) .....

[Para. (a) substituted by s. 20 (b) of Act 61 of 1998 and deleted by s. 6 (a) of Act 51 of 2001.]

(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

(c) a person who has an income in excess of the prescribed amount\*;

[6] From the record it is clear that the applicant found the respondents on the land when he purchased the land. They are thus all occupiers and this was not in dispute. Their rights are provided for in sections 5 and 6 of ESTA. The applicant’s concern that they are receiving visitors is dealt with in section 6(2) (a) of ESTA.

[7] In order for the court to grant an eviction order there must be compliance with the peremptory requirements in section 9(2) of ESTA.

### **Non compliance with Section 9(2) (a) and (b) of ESTA**

[8] The reviewing judge raised concerns with regard to the compliance with section 9 (2) of ESTA. The magistrate’s response in this regard notes that the papers do not allege compliance with section 9(2) of ESTA but submits that

“Section 9(2) (a) have been complied with in that applicant testified that he visited the house of the 1<sup>st</sup> Respondent. Although done orally, he discussed with the family of Respondent no 1 the issue of them leaving the farm, as Respondent no 1, who was absent during this conversation, absconded from work. This was confirmed by Mr. Niewoudt the 2<sup>nd</sup> witness for the applicant”<sup>1</sup>

- [9] The founding affidavit does not refer to compliance with section 9(2) as correctly pointed out by the Magistrate: Fouriesburg. The affidavit makes reference to notice to the relevant Municipality and the Department of Land Affairs (as it then was) and refers to an attached notice marked “F” and “G”. The notices “F” and “G” are the same and indicate the grounds on which the eviction order will be sought as follows:

“ELIAS TSHABALALA was employed by the applicant but the said ELIAS TSHABALALA deserted his employment with the Applicant after 5 days without notice and therefore has no further right to residence, together with his family.

**Due notice to vacate the premises has been given.”** (My emphasis)

The notice requires the applicant to attach a copy of the notice of termination. There is no notice of termination attached.

- [10] Section 8 of ESTA indicates when an occupier’s right of residence may be lawfully terminated and states the following:

“8 Termination of right of residence

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<sup>1</sup> Response of the Magistrate: Fouriesburg dated 5/11/2009

- (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.
- (4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-
- (a) has reached the age of 60 years; or
- (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge, may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.
- (5) On the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10 (1).
- (6) Any termination of the right of residence of an occupier to prevent the occupier from acquiring rights in terms of this section, shall be void.
- (7) If an occupier's right to residence has been terminated in terms of this section, or the occupier is a person who has a right of residence in terms of subsection (5)-
- (a) the occupier and the owner or person in charge may agree that the terms and conditions under which the occupier resided on the land prior to such termination shall apply to any period between the date of termination and the date of the eviction of the occupier; or
  - (b) the owner or person in charge may institute proceedings in a court for a determination of reasonable terms and conditions of further residence, having regard to the income of all the occupiers in the household.
- [Sub-s. (7) substituted by s. 23 of Act 61 of 1998.]

[11] The termination of the first, third and fifth respondent's right of residence may have been governed by section 8(1) of ESTA. However it is noted that the fourth respondent is the mother of the first respondent and was also employed on the

farm by the previous owner.<sup>2</sup> Her age is not apparent upon perusal of the record. The magistrate's finding that she is an occupier to be dealt with in terms of section 8(1) and not section 8(4) does take into account the fourth respondent's age which is not clear from the record.

[12] The record of oral evidence for the applicant indicates;

“Op 3/11/2007, het ek, Henk en een van sy wernemers van Bethlehem na die respondent se huis gery. Dit was op 'n Saterdag. Ons [sic] Henk se werker as 'n tolk gebruik en met die familie van dir Respondnet gepraat. Ons wou uitvind waar Elias is, hulle het toe genome hy werk ann die Rand.

Sy vrou, moeder en ek neem aan sy suster was teenwoordig. Sy ma het die meeste van die praatwerk gedoen

Ons vra toe wanneer hulle die plaas gaan verlaat, aangesien die respondent dros. Hulle noem toe dat hulle geen plek het om heen te gaan nie.”<sup>3</sup>

[13] The second witness Mr Henk Niewoudt also testified as follows:

“ Ek dink hulle het ook gepraat wanneer die mense gaan loop by Fouriesburg en hulle het daaroor iets gepraat wanneer hulle gaan. Ek dink hulle het, maar ek kan nie onthou die detail nie”

[14] The record of oral evidence is not clear with regard to a termination of the right of residence. The question posed to the third fourth and fifth respondents enquiring when they would leave does indicate that they were informed that their right of residence was terminated as occupiers. Further the fourth respondent's age is

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<sup>2</sup> Paragraph 2.4 of the First respondent's answering affidavit.

<sup>3</sup> Oral evidence of the applicant. Extract from edited and typed record dated 22/09/2008

not clear and it is thus not clear whether her right of residence was properly terminated. I am not satisfied that there was compliance with section 9(2) (a). There is no indication of a written notice to vacate as required in terms of section 9(2) (b). Thus I cannot find compliance with the peremptory requirements of section 9 (2) (a) and (b).

[15] Having considered the papers before me and having regard to all the relevant factors herein, the eviction order is set-aside

### **ORDER**

[16] The following order is made;

[1] The order made by the Magistrate Fouriesburg under Case Number 31/2008 is set aside.

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**SC Mia**

**Acting Judge**

**Land Claims Court**

**Appearances:**

**Attorney for Applicant**

**HS MARAIS**

**HS MARAIS**

**BETHLEHEM**

**Attorney for Respondent**

**MR O SEOBE**

**MABALANE SEOBE INC**

**BLOEMFONTEIN**