IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD IN DURBAN **CASE NUMBER: LCC179/11**

Heard on 16th March 2012
Before **Sardiwalla AJ**
Decided on: 14th November 2012

In the case between:

NOMUSA NDABA Applicant

and

TONY REGINALD BRAITHWAITE NO 1st Respondent

JAMES WILLIAM WRIGHT NO 2nd Respondent

HYLTON HUGH LEE NO 3rd Respondent

JUDGMENT

SARDIWALLA AJ:

[1] This is an application seeking an interdict against the respondents or any person acting through them from removing or threatening to remove the applicant, her family members and her livestock from the remainder of Portion 4 of the farm Venters Lager No. 1291 (the farm). The application further seeks to interdict the respondents from threatening, harassing and / intimidating the applicant and her family members.

[2] The applicant and her family members are residents of the farm owned by Damview Trust with the respondents being trustees of the trust. The applicant and her family have been residing on the farm since 1994 in terms of an agreement

entered into by the applicant's husband and the previous owner. The terms and conditions of this agreement are in dispute but the length of residency is not.

[3] The applicant's husband provided labour on the farm until he was retired due to ill health and subsequently died in 2010. The applicant's husband was buried on the farm. After his death disputes arose between the applicant and the respondents or persons acting on behalf of the respondents resulting in the present application. The applicant resides on the farm with her four children, two nephews and one grandson. She keeps 11 head of cattle, 9 goats, 8 sheep and 2 horses.

[4] The applicant in her founding affidavit states that when she arrived with her husband and her family on the farm in 1994, her husband and the previous owner one John Jackson, entered into a labour tenancy agreement in terms of which they acquired rights to reside on the farm and build a home, graze an unlimited number of animals on the farm and grow crops. In exchange for these benefits her husband provided labour on the farm. Other families with similar rights were residing on the farm. In 1998 Damview Trust acquired ownership of the farm and honoured the agreement that her husband had with the previous owner.

[5] When her husband died the applicant attempted to bury him in accordance with established practice next to the homestead which was refused and was buried at a different location on the farm.

[6] The applicant also provided labour on the farm. After her husband's death the applicant received invoices and letters alleging that she owed money for the grazing of her livestock. Since then applicant is continuously being threatened by the respondents with eviction and her family has lived in fear of this eventuality. She believes that this hostility is motivated by a land claim lodged by her husband. The applicant contends that her right of residency emanates from her husband's status as a labour tenant in terms of the Land Reform (Labour Tenants) Act 3 of 1996 (she is an associate), in the alternative she is a labour tenant in terms of the Act and additionally she is an occupier in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA).

[7] The respondents in the answering affidavit deny that a labour tenancy agreement between the applicant's husband and the previous owner ever existed.

The respondents contend that the applicant's husband was a general farm worker who was fully remunerated for the services he provided. The respondent alleges that there was never any right to keep and graze livestock and such allegation is confirmed by Joshua Jackson. In Jackson's confirmatory affidavit he avers that the applicant's husband was allowed to only plant crops and keep fowls. The respondents also dispute that there were other families on the farm and aver that the applicant's family was the only one. When ownership changed the respondents found that the applicant's husband kept cattle, goats, sheep and horses.

[8] The respondents' version is that they entered into an agreement with the applicant's husband allowing him to keep 6 head of cattle only. It was a further condition that if the applicant's husband exceeded the agreed number of animals he will be liable to pay rental on the excess number. The amount due will be deducted from his monthly salary. It is alleged the applicant was aware of this agreement. She was also employed by the trust to supplement the family's income as the husband's income was depleted by the deductions.

[9] The respondents allege they had not threatened the applicant; that they simply sent invoices to collect monies owed to them due to them for the excess livestock. She reacted to the invoices in a hostile manner and refused to honour the agreement that was entered into with her husband.

[10] The applicant allegedly commenced construction of a large concrete block house. The respondents requested that she cease construction forthwith which she refused to do. The respondents' reason for stopping the construction was that they decided to construct a dam on that location of the building. The applicant refused to cease building and a notice in terms of Section 8 (5) of ESTA giving her 12 months to vacate the premises was issued.

[11] The respondents concede that the applicant's husband was an occupier in terms of ESTA; however they deny that neither the applicant nor her husband were labour tenants. It is alleged that this application was instituted in response to the section 8(5) notice.

[12] In the applicant's replying affidavit the applicant maintains that:-

12.1 she disputes and has no knowledge of any agreement between her husband and the Trust regarding grazing fees and she denies that there was ever any such agreement;

12.2 they were always allowed to graze an unlimited number of cattle;

12.3 invoices were received from the respondent but she refused to pay them as she did not believe that her husband and the respondents had any such agreement regarding excess animals;

12.4 the first respondent's son has unlawfully threatened and harassed her and her family;

12.5 the letter sent by the respondents purporting to be a section 8 (5) notice fails in that it does not comply with section 8 (5) and the regulations and is thus not a section 8 (5) notice;

[13] In argument the applicant submits that she is a "labour tenant" or an "associate member" as defined in section 1 of the Act and she is an occupant as defined in ESTA. The applicant's *causa* arises from her rights as an occupier in terms of ESTA and accordingly she has a right to use the land in terms of section 6 (1) of ESTA. The respondents have infringed this right. The contention that she is a labour tenant fell away at the hearing.

[14] Section 9 (1) of ESTA limits the respondents' rights to evict. The respondents have not complied with its provisions and are attempting to evict her without an order of court.

[15] It is further submitted that the conduct of imposing rentals for grazing is an attempt to compel the applicant to reduce the number of cattle and this constitutes as an infringement to her constitutional right to property. Respondents actions are tantamount to infringement on her right to enjoy her culture, sufficient food and her children's rights in terms of section 31, 27 and 28 (1) (c) which constitutionally protected.

[16] In argument the respondents' contend that:-

16.1 an agreement existed with the applicant's late husband limiting the number of cattle to six;

16.2 the applicant has refused to adhere to the limits;

16.3 the section 8 (5) notice was justified as they were entitled to warn applicant that she may be evicted from the farm;

16.4 they cannot be interdicted from exercising their rights to evict applicant and that they have complied with due process.

[17] The following is common cause between the parties:-

17.1 The respondents own the property described as Remainder of Portion 4 of farm Venters Lager No 1291;

17.2 The applicant is an occupier in terms of ESTA;

17.3 The applicant grazes 11 head of cattle, 2 horses, 9 goats and 8 sheep.

17.4 The applicant has erected a concrete dwelling on the farm

17.5 The respondents have demanded that the applicant pay grazing fees for excess livestock which she has refused to pay.

[18] The core issues in dispute are:-

18.1 does an agreement exist between the applicant's deceased husband and the trust regarding grazing fees which is enforceable;

18.2 whether the applicant has been threatened or harassed with eviction

[19] The papers in this matter and the oral arguments seem to delve into many peripheral issues that may not directly relate to the relief sought. In essence the interdict seeks to prevent the respondents from removing or threatening to remove the applicant, her family members and her livestock from the remainder of Portion 4 of the farm Venters Lager No. 1291.

[20] In order to comply for such relief the applicant needs to meet the requirements for a final interdict as the relief she is seeking is not interim in nature and will have the effect of a final determination of the rights of the parties to the litigation.

[21] The requirements for a final interdict are:

21.1 A clear right[1];

21.2 An injury actually committed or reasonably apprehended; and

21.3 The absence of similar protection by any other ordinary remedy.

The applicant must prove that she met the above requirements with regard to the relief she is seeking. Therefore the disputed facts will be dealt with first.

Was there an agreement?

[22] The facts in *Cotler v Variety Travel Goods (Pty) Ltd and Others*[2] were that the appellant had been dismissed summarily without notice; he sued the first respondent for damages he had suffered due to breach of an employment contract. The appellant relied on a written contract between himself and first respondent which required that 3 months notice be given. The respondents alleged that an oral contract had been concluded with the appellant terminating the written employment contract thus they were not in breach. The then Appellate Division per Wessels JA held that:-

> "It was contended that there is no presumption of the continuance of a contract, and that it was for plaintiff to show that at the time of his dismissal during April 1971 he

[1] *Nienaber v Stuckey 1946 AD 2049 1053-1054; Bankorp Tryst Bpk v Pienaar 1993 4 SA 98 (A) 109*
[2] [1974] 4 All SA 16 (A)

had a contract with Variety (the only company cited as a defendant) entitling him to three months' notice. If this were not to be so, it was argued, a plaintiff could found upon any contract concluded in the distant past, and despite changes of circumstances, impose upon the defendant the burden of showing that its terms no longer applied. The defendants did not admit an obligation to give three months' notice and plead a justifiable summary dismissal. It did, therefore, not plead a special defence of a kind which ordinarily attracts the burden of proof. In support of his argument counsel referred this Court to the principles laid down in Pillay v. Krishna and Another, 1946 A.D. 946, and to certain decided cases where these principles were applied, e.g., Electra Home Appliances (Pty.) Ltd. v. Five Star Transport (Pty.) Ltd., 1972 (3) S.A. 583 (W), Kriegler v. Minitzer and Another, 1949 (4) S.A. 821 (A.D.), and Sun Radio and Furnishers v. Republic Timber and Hardware (Pty.) Ltd., 1969 (4) S.A. 378 (T). It was, further, contended that the "broad substance" of the defendants' plea is that plaintiff was employed by Kiddies, not by Variety, at the time notice terminating his employment was given, and that one month's notice was given, and that one month's notice was apposite to this employment. The fact that defendants set out some history as to how this situation was reached, cannot affect the substance of the plea, namely, a denial of the contract relied on by plaintiff."

[23] It is trite law that in actions of contract, proof of the contract, performance of conditions precedent, breach and damages is upon the plaintiff.[3]"

[24] *In casu* the respondents allege an agreement was entered into with the deceased husband. The respondents have the onus of proving the existence of such an agreement and the terms and conditions thereof.

[25] In *Da Mata v Otto*[4] the then Appellate Division the defendant alleged that an agreement had been entered into with the deceased and there was no record of such agreement. The Court held that:-

"In regard to the appellant's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted—the only witness who could have disputed them had died—they should be taken as proof of the facts involved. Wigmore on Evidence, 3rd ed., vol. VII, p. 260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a

[3] Phipson on Evidence (Ace edition at 28)
[4] [1972] 4 All SA 33 (A)

quantative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:-

> "It is not infrequently supposed that a sworn statement is necessarily proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts—testimony which no sensible man can believe—goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded."

[26] In casu it is disputed by the applicant that her husband entered into such agreement.

[27] In *Pereira v Smith & others*[5] the Court held that since the defendant denied the agreement in its totality the plaintiff bore the onus of proof. The Court found that there was an agreement because the defendant proved to be an unreliable witness.

[28] *In casu* we have not had the benefit of oral evidence and a sworn statement does not provide sufficient proof. What follows is whether or not the respondents have on the papers proven that an agreement existed. The salary slip attached to the answering affidavit is to a degree illegible, possibly because of passage of time. However, what is clear is that there were deductions from her late husband's salary in the following amounts:-

I. R 463.65 for livestock
II. R 220.00 for 50Kgs of … (unclear).

On the other hand the invoice issued to the applicant indicating the amounts she owes as grazing fees totals R2 250.00 for a period of 30 days.

[29] There has been no evidence by either party that the applicant has significantly increased the number of cattle since her husband's death. On the respondents' version the applicant's family was only allowed to keep 6 head of cattle and the invoice appears to have erroneously included the 6 head that were allowed. The amount is therefore incorrect and the amount allegedly owing should read

[5] [2006] JOL 16834 (D)

R1 650.00. The question thus arises why is there such a large difference between the husband's salary deduction of R683.65 and the amount claimed if an agreement had indeed been reached.

[30] The total deduction from his salary was R683.65 as indicated on the salary slip, against the applicant's invoice of R2 250.00 for a 30 day period. One can therefore safely conclude that the amounts cannot be in terms of an agreement entered into with her husband.

[31] A further contradiction in the respondents' version on the terms of the agreement emerged from the following:-

31.1 the respondents' affidavit avers that the agreement with the deceased was that he was only allowed to keep 6 head of cattle;

31.2 in respondents' section 8 (5) notice to the applicant they indicate that the applicant is only allowed to keep 2 head of cattle;

31.3 in the invoice sent to the applicant they charge the applicant for all her cattle indicating that she is not allowed to keep any cattle without payment;

31.4 the salary slip also appears to be ambiguous in that it simply refers to "livestock" and not as it should to grazing fees for a specified number of cattle. The word "livestock" in the context of this matter is open to many interpretations.

[32] My conclusion therefore is that the respondents have failed to discharge their onus of proving there was an agreement. The evidence before me is contradictory and inconclusive.

[33] The alternate hurdle that the respondents face is the enforceability of a contract against the applicant. The doctrine of privy of contract has its basic

tenements in the principle that people must be bound by the contracts they make with each other. The doctrine provides that parties who are not privy to a contract cannot sue or be sued on it[6]. Thus even if it is doubtful there was an agreement with the deceased husband what is clear is that there was never one with the applicant. While the respondents contend that she was aware of the agreement and was employed to supplement their income because of it this is not sufficient; she was not privy to the contract and thus cannot be bound by it. Upon the death of the applicant's husband the respondents ought to have entered into an agreement with the applicant and spelt out the terms and conditions thereof or hold the executor of the deceased's estate responsible. There is no such evidence before this Court.

[34] For a final interdict to be granted the applicant must satisfy the Court that it has met with the following requirements:-

34.1 A clear right

Both parties have conceded that the applicant is an occupier in terms of ESTA that is not in dispute. As an occupier she enjoys the right to use the land as envisaged in section 6 (1) of ESTA. The respondents suggested that there existed a dispute of fact because her right to use the land was limited to a fixed number of cattle which she exceeded; this argument however cannot be sustained.

The Court in *Stellenbosch Farmers' Winery Ltd* v *Stellenvale Winery* (*Pty*) *Ltd*[7] held that:

> ". . . . where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order . . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted".

In terms of *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd*[8]; the above general rule is qualified:

[6] Christie RH. *The Law of Contract in South Africa (5th Ed)* (LexisNexis, Durban 2006) at 260
[7] 1957 (4) SA 234 (C) at p 235 E-G

> "It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact"

In *Peterson v Cuthbert & Co. Ltd*[9] the court held that:

> 'In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence; if this is not done, the lessee, against whom the ejectment is sought, might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the lessor.'[10]

The respondents rely on the agreement to dispute that the applicant has a clear right. My findings on the agreement have been discussed and the respondents in my view have failed to prove that such agreement exists. Consequently, it cannot be said that there is a *bona fide* dispute of fact preventing the court from granting this interdict.

34.2 <u>An injury actually committed or reasonably apprehended</u>

Applicant must prove an actual injury or one that is reasonably apprehended. On the question of threats and harassment to evict the

[8] [1984] 2 All SA 366 (A)
[9] 1945 AD 420
[10] 1945 AD 420 at 428

applicant in her founding affidavit contends that the respondents have been sending her threatening letters stating that she would be evicted. The respondents' counsel rightly pointed out that no such letters were made available. However, the applicant's argue that the invoices received by the applicant demanding she pay for her right to use the land is tantamount to a threat to evict within the meaning of ESTA. Save for the invoices and demand to pay coupled with a verbal threat by one Joshua to remove the applicant from the farm with her livestock, there is no evidence of persistent harassment.

There is a lack of evidence of any persistent threat or harassment. The applicant's argument rests on the respondents' conduct in trying to compel applicant to pay a rental. She contends that such compulsion amounts to an infringement of her right to use land in terms of section 6 (1) of ESTA and effectively eviction. Eviction in terms of ESTA:-

> "means to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence on terms of this Act and "eviction" has a corresponding meaning."

The applicant contends that the conduct of attempting to charge grazing fees amounts to an eviction as it deprives the applicant, against her will, usage of the land. That is the applicant's version.

The word deprive is defined as:

1. To take something away from
2. To keep from possessing or enjoying; deny..."[11]

In *Ntshangase v The Trustees of the Terblanché Gesin Familie Trust & another*[12], Gildenhuys J held:

> "Cutting off the applicant's access to portions of the farm which she is entitled to use, constitutes a form of eviction."

[11] New Shorter Oxford English Dictionary
[12] [2003] JOL 10996 (LCC)

The applicant's entire case relies on the respondent threatening to evict her or harassing her by trying to impose grazing fees. The respondent on the other hand notes that they have in no way threatened or harassed the applicant and provide that they are simply attempting to exercise a legal right. What is admitted by both parties is that the respondent has invoiced the applicant and made her aware that failure to pay her grazing fees would result to eviction. The applicant claims this is a deprivation of her use of the land which amounts to an eviction. However, the applicant has failed to show as in *Ntshangase* that there has been deprivation which amounts to eviction; the applicant still has the same rights of access as previously held and she is still grazing her cattle. The conduct of sending an invoice cannot be regarded as deprivation of use of land.

In *Margre Property Holdings CC v Jewula*[13] it was held that:

> "...a balance is required to be struck between the rights of an owner not to be arbitrarily deprived of his property and the rights of a person whose tenure of land is legally insecure as a result of past racially discriminatory laws to tenure which is legally secure."

This case is a clear indicator of how delicate it is to balance the rights of the owner with those of the occupier. The respondents have levied grazing fees which are disputed; this was followed by proceedings to legally evict the applicant that she is entitled to defend. The respondents have not prevented the applicant from grazing her cattle. Regardless of their failure to prove the agreement the respondents have done nothing to indicate that they have surpassed their rights as owners of the property and such rights should not be arbitrarily deprived.

The applicant has failed to prove that there is an actual or reasonable apprehension of injury.

[13] [2005] A All Sa 119 (E)

[35] To grant the applicant a final interdict I must be satisfied that the applicant is being imminently threatened with eviction. The applicant has not shown this within the ambit of ESTA.

Order:-

The application is dismissed.

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SARDIWALLA AJ

FOR APPLICANT

Mr. Singh representing *Attorney Sundeep Singh & Associates,* Pietermaritzburg

FOR RESPONDENTS

Mr. Marshall representing *McCaulay & Riddell,* Bergville