

IN THE LAND CLAIMS COURT OF SOUTH AFRICA**RANDBURG****In Chambers: Loots AJ****LCC 61R/2011****COETZEE & SEUNS (EDMS) BPK****APPLICANT****and****SALOMON DEES****RESPONDENT**

REVIEW JUDGMENT

- [1] This matter comes before me on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act, Act 62 of 1997 (ESTA).
- [2] The Applicant applied for an eviction order in terms of ESTA in the Magistrate's Court for the District of Caledon under case number ESTA 4/2011. The respondent opposed the application. On 1st August 2011 the application was argued. On the same day the magistrate gave a judgment in terms of which the respondent and any other persons occupying through him were ordered to vacate the house on or before 1 October 2011, failing which the sheriff was authorized to evict them on 3rd October.¹ The eviction order was suspended pending review.
- [3] The eviction order was granted in terms of section 10(1)(c) of ESTA, which allows a court to grant an eviction order on the ground that 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 that could reasonably restore the relationship. Having considered the documents in the court file, I am not satisfied that the magistrate was correct.
- [4] The applicant company owns a farm which produces soft fruit, which is named 'Arina' and which is situated in Villiersdorp in the Western Cape

¹ The application and the judgment in the magistrate's court reflect the applicant as being 'Goedgedacht Edms Bpk', but it is explained in the papers that this was an error and that the correct party is Coetzee & Seuns (Edms) Bpk. The Magistrate should correct this in terms of section 111(3) of the Magistrates' Courts Act, Act 32 of 1944.

(the land). The founding affidavit, made by Mr Coetzee who is a director of the company, alleges that the applicant purchased the farm in 2005 and took over the services of the respondent, who had been employed by the previous owner. A written employment contract signed by the respondent in 2008 is annexed. It is further alleged that previously, in 2006, a written accommodation agreement had been concluded with the respondent and that his right to accommodation in a labourer's cottage on the farm was strongly coupled to his employment.

- [5] The founding affidavit further alleges that in April 2010 the respondent was charged with being absent from work without leave for a period of approximately two weeks. Mr Coetzee says that on 12th April 2010 he personally handed to the respondent's wife notice of a disciplinary hearing to be held on 14th April 2010. The respondent failed to appear for the disciplinary hearing. He was found guilty in absentia and was dismissed. On 15th April 2010 the following documents were delivered to the respondent's wife: the minutes of the hearing, notice of dismissal and a letter advising the respondent that, since his employment had been terminated, he and his family must vacate the house which they were occupying not later than 31st May 2010. Their failure to vacate gave rise to the application for an eviction order.
- [6] The respondent is Salomon Dees. In his opposing affidavit, he states the following: He is 40 years old. He was born on the farm and worked on the farm from the age of twelve years. He did not attend school and cannot read or write. He is able to sign his name. The founding affidavit was read to him by his wife and his attorney. He admits that the employment contract and accommodation were signed by him, but he alleges that the contents were not explained to him and he did not know that his right to accommodation was contingent upon him being employed on the farm.
- [7] The respondent admits that he was purportedly dismissed at a disciplinary hearing, but alleges that he was not given sufficient notice of the hearing. He says that he was absent for seven days and that on the eighth day, when he went to apologize for his absence, he was told by the supervisor that he had already been dismissed and that he must immediately vacate the house which he was occupying. He admits that he did not take the matter of his dismissal to the Commission for Conciliation, Mediation and Arbitration, but says that he was not given notice of his right to do so. He accordingly denies that the dismissal was in accordance with the Labour Relations Act.² He says that it was the first time that any disciplinary action had been taken against him and he should have been dealt with in accordance Schedule 8 of the Labour Relations Act.

² Act 66 of 1965.

- [8] This Court has no jurisdiction to decide labour issues,³ so I will proceed on the assumption that the dismissal was not unlawful and consider whether the eviction was lawful in terms of ESTA.
- [9] The first requirement in terms of ESTA is that the occupier's right of occupation must be terminated in terms of section 8. Section 8(2) provides that –
- '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.'
- There is some doubt as to whether the respondent's right of occupation arises solely from an employment agreement, since he alleges that he was born on the farm and has lived there ever since. If his right of residence did not arise solely from his employment, then the 'just and equitable' requirements of section 8(1) of ESTA apply.
- [10] For the purpose of this judgment, I am going to assume that the termination of the respondent's occupation was effective either in terms of section 8(1) or section 8(2), because effective termination in itself is not enough to justify eviction.⁴ Section 9(2)(c) requires that the conditions for an order of eviction in terms of section 10 or 11 must have been complied with. Section 10 applies in respect of the eviction of a person who was an occupier on 4th February 1997. Section 11 applies to persons who became an occupier after 4 February 1997.
- [11] The respondent is protected by section 10. The applicant in the founding affidavit and in counsel's heads of argument relied upon section 10(1)(c). The magistrate found for the applicant on the basis that the respondent's absence from work without leave constituted a fundamental breach of the relationship between applicant and respondent.
- [12] The problem I have with this finding is that section 10(1)(d) is specific to the situation where it has been found that the employee's right of residence arose solely from that employment and provides that an eviction may be granted only if the occupier 'has voluntarily resigned in circumstances that do not amount to constructive dismissal'. This very limited scope for the eviction of an employee indicates that the legislature did not intend that the ground for dismissal should also serve as the ground for eviction.

³ See sections 8(2) and (3) of ESTA.

⁴ See *Mpedi & Others v Swanevelder & Another* 2004 (4) SA 344 (SCA) at 348D. The assumption that the termination of the respondent's occupation was effective either in terms of section 8(1) or section 8(2) is not to be construed as a decision to this effect. These issues can still be considered and decided by an appropriate court.

- [13] The only ground upon which the magistrate found that there was a fundamental breach of the relationship was the respondent's absence from work without leave – the same ground on which he was dismissed. If that was enough, then there would be no point in the legislature limiting section 10(1)(d) to voluntary resignation. It seems to me that the legislature deliberately avoided a situation where any breach of the employment contract which warranted dismissal would also be regarded as a fundamental breach of the relationship. This constitutes an important difference between the protection afforded to a section 10 occupier and the protection afforded to a section 11 occupier.
- [14] ESTA provides more stringent limitations on the eviction of a section 10 occupier because of the long-standing nature of the tenure. The respondent in this case had lived on the farm for 40 years, since his birth. His tenure long pre-dates his employment by the applicant company. There may be provisions in the accommodation contract signed in 2006 and the employment contract signed in 2008 which link his accommodation to his employment, but a court is not bound to give effect to an agreement which seeks to limit any of the rights of an occupier in terms of ESTA.⁵ The purchaser of land regulated by ESTA is bound to give effect to the rights of persons who are occupiers, as defined in ESTA.
- [15] It is clear that, in the absence of the type of conduct envisaged in section 10(1), a section 10 occupier such as the respondent can be evicted only if there is alternative accommodation for him and his family, as envisaged in section 10(2) or section 10(3), both of which refer to the availability of alternative accommodation. There are allegations in the affidavits concerning alternative accommodation. Both the landowner and the occupier allege that they have approached the local municipal authority and have been told that there is no available housing.
- [16] The responsibility for finding alternative accommodation is a shared responsibility. ESTA requires not less than two months notice of an application for eviction to be served on the municipality having jurisdiction over the land and the head of the relevant provincial office of the Department of Land Affairs (now the Department of Rural Development and Land Reform). The purpose of this is to warn them that they should become involved in giving effect to the constitutional rights of the occupiers to have access to adequate housing. Unfortunately they generally turn a blind eye to the notices and become involved only if they are compelled to do so. The landowner,

⁵ See s 25(2) of ESTA.

the occupier and these organs of state share the responsibility to find alternative accommodation and all are expected to be pro-active about the issue.

- [17] I have decided to set aside the eviction order and refer this matter back to the magistrate to consider whether an eviction can be granted in terms of the provisions of either section 10(2) or section 10(3). I strongly recommend that the magistrate should first convene a conference in terms of section 54 of the Magistrates' Courts Act⁶ and require all the role-players mentioned in paragraph [16] to attend the conference for the purpose of trying to find a solution to the need which the respondent and his family have for long-term security of tenure. Magistrates have wide powers in terms of section 54 of the Magistrates' Courts Act and they should use those powers, particularly in eviction proceedings against vulnerable persons. If the municipal authority and the provincial Department of Rural Development and Land Reform fail to attend such a conference then they should be joined as parties so that appropriate orders, including orders of costs, can be made against them.
- [18] It is often argued and has been held⁷ that the legislature could never have intended that the landowner should provide accommodation free charge to the occupier for ever. I agree. This is why sub-sections 10(2) and 10(3) were included in the Act. Evidence must be placed before the court which will enable it to consider whether an eviction order can be granted in terms of either of those sections.
- [19] Another reason for remitting this matter to the magistrate is that the magistrate did not have the benefit of a probation report, as required by section 9(3) of ESTA, to assist in deciding whether the conditions for an order in terms of section 10 had been complied with. There is a copy of a request for such a report which was faxed to the Provincial Director of the Department of Land Affairs on 30th March 2011, but no evidence of any follow-up to this request. It has been held that a court may proceed to consider an application for eviction in terms of ESTA if a probation report is not received within a reasonable time.⁸ However, it has also been held that a judicial officer should consider the circumstances of the case before deciding whether to proceed in the absence of a report.⁹ The magistrate may have formed the

⁶ Act 32 of 1944.

⁷ *Theewaterskloof Holdings (Edms) Bpk, Glaser Afdeling v Jacobs en Andere* 2002 (3) SA 401 (LCC) para [16].

⁸ *Theewaterskloof Holdings (Edms) Bpk, Glaser Afdeling v Jacobs en Andere* 2002 (3) SA 401 (LCC) para [13]; *Pannar Research Farms (Pty) Ltd v Magome and Another* 2002 (5) SA 621 (LCC) para [17]; *Berti Eggers Trust IT 12084 v Hlatswayo & Others* LCC 83/2010.

⁹ *El Rio Farming (Pty) Ltd v Phillipus Jacobs* LCC 36R/2011 citing *Holt Leisure Park (Pty) Ltd v Josephs & Another* LCC 62R/2000.

opinion that the probation report was not necessary if the eviction was to be ordered on the basis of section 10(1)(c) of ESTA,¹⁰ but it certainly will be necessary if the matter is to be considered in terms of sections 10(2) or 10(3).

[20] In this matter the respondent has been living on the farm since he was born and is illiterate. This makes him vulnerable. He has a wife and four dependant children who live with him. In these circumstances I believe that it is important for the court to have the benefit of a probation report.

[21] The following order is accordingly made:

Order

- 1. Paragraphs 1, 2 and 4 of the order made by the magistrate on 1st August 2011 are set aside.**
- 2. The case is remitted to the magistrate in terms of section 19(3)(d) of the Extension of Security of Tenure Act, Act 62 of 1997 [ESTA] to determine the following:**
 - 2.1 whether section 10(2) of ESTA is applicable; and if not**
 - 2.2 whether the requirements of sub-sections 10(3)(a), (b) and (c) of ESTA are complied with; and if so**
 - 2.3 whether the granting of an eviction order is just and equitable having regard to the provisions of sub-sections 10(3)(c)(i) and (ii) of ESTA.**
- 3. The magistrate shall receive such further evidence as is necessary to make the determinations set out in paragraph 2 of this order.**

¹⁰ See *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another* 2001 (1) SA 1017 (LCC) paras [5] to [7]. Cf *Valley Packers Co-operative Ltd v Dietloff & Another* [2001] 2 All SA 30 (LCC) and *Glen Elgin Trust v Titus & Another* [2001] 2 All SA 62 (LCC).

4. The magistrate must ensure that a probation report in terms of section 9(3) of ESTA is furnished and to this end must provide the relevant official with a copy of this judgment.

5. Any eviction order which the magistrate may make after reconsideration of this matter, or in terms of any settlement between the parties, or as a consequence of a conference in terms of s 54 of the Magistrates' Courts Act, is subject to automatic review by this court.



C. E. LOOTS AJ
14th March 2012