IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NUMBER: LCC08/2014

Decided: 24 April 2014

In the matter between:

ALFRED PIETERSEN Appellant

and

RAINBOW FARMS (PTY) LTD Respondent

JUDGMENT

A. INTRODUCTION

1. The appellant appeals against an order for his eviction from the farm known as "Laying Farm 4, Worcester", ("the farm"). The order was granted in terms of the Extension of Security of Tenure Act, No 67 of 1997 (ESTA) in the Worcester Magistrate's Court on 18 September 2013.
2. The grounds of appeal, in essence are that:
   (a) The appellant was at the time of the termination of his employment permanently unable to supply labour to the respondent due to disability. He was therefore protected by the

provisions of Section 8 (4)(b) of Esta from having his residency on the farm terminated[1].

(b) The court a quo erred in disregarding the medical evidence that the appellant was permanently unfit to supply labour to the respondent, and

(c) The court a quo erred in granting an eviction order without finding that Section 10 of Esta applied in the circumstances of this case.

B. BACKGROUND

3. The events that led to the appellant's eviction are, in summary, as follows:

   The appellant was employed by the respondent before 1997 and, by virtue of his employment, given the right to reside in the premises situated on the respondent's farm thereby acquiring occupier status as envisaged by ESTA.

4. As a result of the appellant absconding from work, his employment was terminated on 3 March 2008 following a disciplinary enquiry. The appellant did not challenge the outcome of that enquiry. Having ignored demands to vacate the premises on the farm, the respondent launched an application for the appellant's eviction during 2012.

[1] Section 8(4)(b) states that 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 is an employee or former employee of the owner or person in charge, and as a result of ill health, in jury 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)*.

5. The appellant alleged that, due to the nature of his work, which required him to pick up heavy objects, he suffered debilitating back ache. The result was that, following hospitalisation in 2000 and visits to medical practitioners and an occupational therapist, he was ultimately declared permanently unfit for work by a Dr Valley-Omar on 3 November 2007. This doctor also referred him to the District Surgeon in order to apply for a disability grant.

6. Evidence submitted by the respondent shows that its Provident Fund manager, Momentum Collective Benefits, responding to the appellant's disability claim, found on 1 February 2008 that the medical information did not suggest that the appellant was totally and permanently incapable of engaging in his own or any occupation. He was consequently found to be only entitled to a 3 months temporary benefit claim and that thereafter he would be able to return to work.

7. The Court a quo, in granting the eviction order, found that, although the appellant had health related problems, he had not adduced any evidence to support his contention that he had been declared permanently unfit to work when his employment was terminated in March 2008. The respondent had therefore, in the presiding officer's view, complied with all the requisite provisions of ESTA to justify the grant of an eviction order.

8. I will now examine the Court a quo's findings as against the appellant's grounds of appeal and the respondent's counter thereto.

C. DID THE APPELLANT SATISFY THE REQUIREMENTS OF SECTION 8(4)(b)?

9. During argument, Ms Ruiters, who appeared on behalf of the appellant, effectively abandoned all the appellant's grounds of appeal save for the one claiming the protection afforded by Section 8(4)(b) of ESTA.

10. In order for the appellant to be entitled to the Section 8(4)(b) protection, he must have been an occupier who has resided on the land in question for 10 years and is an employee or a former employee of the owner or person in charge of the land and who, as a result of ill health or disability, is unable to supply labour to such owner or person in charge. If he meets the aforementioned criteria, then his occupancy may not be terminated unless he has committed a breach contemplated in Section 10(1)(a), (b) or (c) of ESTA. Section 8(4)(b) also provides that the mere refusal or failure to provide labour does not amount to a breach of Section 10.

11. It is common cause that, as at the commencement of the trial, the appellant had been in occupation of the premises on the farm for more than 10 years, that he was not employed by or was rendering any services to the respondent and that he was living on the farm rent free since termination of his employment some 6 years ago.

12. That appellant met the requirements of the definition of an occupier[2] at the commencement of the respondent's application for

[2] An occupier is defined as 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. The definition sets out 2 exclusions

his eviction is also not in dispute. Although the appellant denied that his employment had been lawfully terminated, the Court a quo correctly found that, given that the appellant had not challenged the fairness of his dismissal, the respondent had complied with the provisions of Section 8(2) of ESTA. The appellant can therefore, properly, be regarded as the respondent's ex-employee.

13. The next enquiry is to ascertain whether the Court a quo was correct in finding that there was no medical evidence before it to prove that the appellant was medically incapacitated at the time of his dismissal.

14. In support of his contention that the disability which rendered him permanently unable to supply his labour to the respondent had occurred prior to his dismissal, the appellant relied on a medical certificate by Dr Valley-Omar stating that he was, due to "osteo-arthritis lumber spine…. permanently unfit" for duty. Dr Valley-Omar's certificate of indisposition cites him as a General Practitioner and is dated 03–11-2007. Then, in a separate note, Dr Valley-Omar requested a colleague to re-assess his diagnosis and asked that colleague to arrange an appointment for the appellant to apply for a disability grant with the District Surgeon. Dr Valley-Omar did not testify at the hearing nor did he depose to an affidavit confirming his diagnosis that the appellant was permanently disabled.

15. The respondent attacked the medical certificate on the basis that it constituted inadmissible evidence in that it was hearsay and opinion

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which relate to persons using the land for commercial purposes or who have income above a certain threshold.

evidence. No attempt had been made to qualify the doctor, no confirmatory affidavit filed and no basis established in the appellant's answering affidavit for the admission of that evidence, so the respondent contended. I agree.

16. It is trite that if an applicant elects to place evidence before the court in support of an allegation contained in his application, he must do so in the proper form. Such evidence must also conform to all the rules of evidence, including the rules relating to admissibility. See the dicta of Viljoen J in Primich v Additional Magistrate, JHB and Another 1967 (iii) SA 661 at 669 D – E. See also Joshua v Joshua 1961 (i) SA 455 at 457 B where it was held that if there is enough time , as there was in this present matter, a doctor's certificate must be proved in the correct manner. Therefore, the medical certificate of Dr. Valley–Omar which the appellant seeks to rely on needed to have been duly attested and authenticated for it to have been properly before the Court a quo.

17. I consequently find that the Court a quo correctly found that there was no medical evidence to support the appellant's contention of medical incapacitation at the time of his dismissal. Dr Valley-Omar's request to a colleague to "kindly reassess" his diagnosis also weakened whatever weight was sought to be attached to that diagnosis. Regard is also had to the fact that Momentum Collective Benefits found the appellant to have been only temporarily disabled.

18. Having found that the appellant has not proved the disability required by Section 8(4)(b), it would ordinarily not be necessary to

enquire as to whether or not he had committed any of the breaches contemplated by Section 10(1)(a), (b) or (c) of ESTA. It being a fundamental requirement of Section 8(4)(b) that an employee or former employee proves that ill health or a disability has rendered him or her unable to supply labour to the owner or person in charge of the land. The appellant has failed to prove this.

19. However, in the event that I may be wrong in my view as to the inadmissibility of the medical evidence, the appellant, in order to avail himself of the protection of Section 8(4)(b), still had to show that he was not in breach of Section 10(1)(a), (b) or (c) of ESTA. The respondent contends that the appellant has breached Section 10(1)(c)[3] and thus remains subject to eviction.

20. The respondent, in support of its contention that its relationship with the appellant had broken down irreconcilably, alleged that the appellant has not only lived rent free on its premises for approximately 6 years whilst not being employed by it but had also threatened, with bodily harm, three of its managers and their families. The evidence of one of the threatened managers was submitted in a confirmatory affidavit.

21. The evidence does, indeed, show that the appellant has breached Section 10(1)(c) of ESTA. The late Bam JP in the unreported case of Smith SJPK v Kgolenge NE and Others LCC 26R/2002 at paragraph 17 held that the test to apply in ascertaining whether the breach in the

[3] S10(1)(c) states that an order for the eviction of a pre- 4 February 1997 occupier may be granted if that occupier had committed a breach that is so fundamental that the relationship between him or her and the owner or person in charge cannot be remedied.

relationship between the parties was fundamental was a difficult one when it does not relate to an employment relationship. According to the learned Judge President, Section 10(1)(c) primarily envisages the breakdown of a social rather than a legal relationship.

22. In the present matter, the employment relationship having already been severed, what is at issue then, is the social relationship. The appellant who since his dismissal in March 2008 for absconding from work, without any further right thereto, lived rent free on the respondent's farm. He has also threatened some of the respondent's employees and, because he is no longer an employee, is not subject to the respondent's authority insofar as enforcement of measures to protect its operations is concerned.

23. When taken in its totality, the appellant's actions make it clear that the breach in the relationship between the parties is such that it is not practically possible to remedy same. Therefore, the breach is fundamental as is contemplated in Section 10(1)(c) of ESTA.

24. In the result, I find that the appellant has failed to satisfy the requirements of Section 8(4)(b) and that the Court a quo correctly granted the eviction order.

D. COSTS

25. The practice of this Court is not to make costs orders unless there are special circumstances which warrant such an order[4]. Ms Nel, who appeared on behalf of the respondent, did not argue that there were special circumstances in this matter that necessitated a departure from this practice. The practice is based on litigation in this Court being in the genre of social litigation and conforms to the general rule that, in constitutional litigation, an unsuccessful litigant should not be visited with an order to pay his opponents' costs in the absence of special circumstances[5]. The facts of this case do not warrant a departure from this practice.

E. ORDER

26. For the reasons set out above, I make the following order: -

1. The appeal is dismissed.

2. The date on which –

(a) the appellant and all persons who occupy through him are to vacate House 3, Rainbow Farm 4, Worcester is amended to be 31 May 2014; and

(b) the eviction order given by the Court a quo may be carried out if the appellant and all those who occupy through him have failed to vacate, is amended to be 2 June 2014.

[4] See Dukuduku Community v Regional Land Claims Commissioner KZN 2006 (3) SA 515 (LCC).
[5] See dicta of Gildenhuys J in Midlands North Research Group v Kusile Land Claims Committee, the Regional Land Claims Commissioner, KwaZulu Natal and Others LCC 21/2007 at 6 [para15] and the cases cited therein.

3. There is no order as to costs.

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M. P. Canca

Acting Judge of the Land Claims Court

I agree

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M. Mpshe

Acting Judge of the Land Claims Court