IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

LCC Case No: 04R/2016

Court *a quo* Case No: U4056/2015

In the matter between:

FRANCO LEE Appellant

(Respondent in the Court *a quo*)

and

PETRUS JOHANNES MERWE VAN RENSBURG Respondent

(Applicant in the Court *a quo*)

Date of Hearing: 23 September 2016

Date of Judgment: 17 October 2016

JUDGMENT

BARNES AJ

Introduction

1 This is an appeal against an eviction order granted against the Appellant in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA") by the Worcester Magistrates Court on 3 December 2015.

2 The eviction order was granted by default, the necessary allegations having been made in the founding affidavit, and the Appellant, despite personal service of the application, having failed to take any steps to oppose it. The eviction order was upheld by this Court on automatic review in terms of section 19(3) of ESTA on 27 January 2016.

3 The appeal is without merit. A number of the grounds of appeal fly in the face of the contents of the record and are therefore unsustainable. The remainder of the grounds are palpably unmeritorious. Lamentably, this appeal constitutes an example of litigation that was not reasonably justified or properly conducted.

4 In order to demonstrate this, it is necessary to deal with the eviction application and the grounds of appeal in some detail.

The Eviction Application

5 On 14 September 2015, the Respondent launched an application for the eviction of the Appellant from the farm Bosjesmans Valley, No [...], Portion 63, falling

under the Breede Valley Local Municipality in the district of Worcester, commonly known as “Klippiesbaai” (“the Farm”).

6 In his eviction application, the Respondent made the following allegations:

6.1 The Appellant was employed on the Farm as a general labourer and was, in terms of his employment agreement, entitled to reside on the Farm.

6.2 As from 1 November 2014, the Respondent became the Farm manager and the person in charge of the Farm. He did so pursuant to the purchase of the Farm by Sandrivier Wingerde (Edms) Bpk (“Sandrivier”).

6.3 Sandrivier took over the employees on the Farm including the Appellant. The Respondent was the person in charge of those employees, including the Appellant.

6.4 The Respondent was not aware of the period for which the Appellant had lived and worked on the Farm.

6.5 After his arrival on the Farm, the Respondent requested the Appellant to enter into a new written contract of employment with Sandrivier. The Appellant refused to do so.

6.6 Thereafter, the Appellant absented himself from work.

6.7 A disciplinary enquiry was held which found the Appellant guilty of unauthorised absenteeism and dismissed him.

6.8 On 27 May 2015, Sandrivier’s attorneys addressed a letter to the Appellant which:

6.8.1 recorded that the Appellant had been dismissed as a result of unauthorised absenteeism;

6.8.2 stated that, as a consequence of his dismissal, the Appellant was no longer entitled to reside on the Farm; and

6.8.3 gave the Appellant 30 days to vacate the Farm.

6.9 This letter was served personally on the Appellant by the sheriff on 28 May 2016.

6.10 The Appellant did not vacate the Farm.

6.11 The house being occupied by the Appellant was required for Farm employees.

6.12 As far as the Respondent was aware, there was alternative accommodation in the nearby town and on the surrounding farms.

6.13 In all the circumstances, an order for the eviction of the Appellant would be just and equitable.

7 The record of the proceedings before the Magistrates Court reveals the following:

7.1 There was personal service by the sheriff of the letter of 27 May 2015 on the Appellant on 28 May 2015.

7.2 There was personal service by the sheriff of the eviction application on the Appellant on 17 September 2015.

7.2.1 The notice of motion served on the Appellant stated that the eviction application would be heard in the Worcester Magistrates Court on 3 December 2015.

7.2.2 The sheriff's return of service recorded that the Appellant was advised that he was entitled to legal representation and that he could apply for legal representation if necessary.

7.3 The eviction application was served on the Cape Winelands District Municipality by sheriff and on the Department of Rural Development and Land Reform by registered post.

8 The Appellant filed no notice of opposition or answering affidavit.

9 The eviction application was heard in the Worcester Magistrates Court on 3 December 2015. There was no appearance by the Appellant. The Magistrate granted the eviction order and ordered the Appellant to vacate the Farm by 31 January 2016.

10 The matter then went on automatic review to this Court. On 27 January 2016, this Court confirmed the eviction order, subject to an amendment in terms of which the Appellant was ordered to vacate the Farm by 29 February 2016.

11 Prior to granting its order, this Court enquired from the Worcester Magistrates Court whether a Probation Officer's report had been obtained in the matter. The Magistrate responded in writing. She stated that a report had been requested some two and a half months prior to the hearing of the matter but had not been

forthcoming. The Magistrate stated that she was of the view that she was not required to delay the finalisation of the matter further and relied in this regard on the dictum by Gildenhuys J in *Theewaterskloof Holdings (Edms) Bpk, Glaser Afdeling v Jacobs en Andere* 2002 (3) SA 401 (LCC) which held as follows:

> "Hierdie lang vertraging is onanvaarbaar. Indien n proefbeampte verslag nie binne a redelike tyd naadat dit aanvra is, beskikbaar gestel word nie, kan n Landdros sonder die verslag voortgaan om die saak te bereg. Artikel 9(3) van die Verblyfreg Wet vereis nie dat die verslag beskikbaar moet wees, dit vereis slegs dat die verslag aangevra moes gewees."[1]

12 In conclusion, the Magistrate stated as follows:

> "Since a probation officer's report was not forthcoming as well as the respondent not appearing at court there were no grounds for the court to remand the matter once again. The applicant had made his case and the court had to give judgment."

13 Importantly, the Magistrate's letter to this Court in which she set out her reasons for determining the eviction application in the absence of a Probation Officer's report formed part of the appeal record. The Appellant's representatives must, therefore, have been aware of its contents, including the Magistrate's reliance on the *Theewaterskloof* judgment.

<u>Grounds of Appeal</u>

14 In the face of the above, on 8 February 2016, the Appellant noted an appeal on the following grounds:

[1] At para 13 of the judgment.

14.1 that the Court *a quo* erred in finding that there had been personal service of the eviction application on the Appellant and that the Appellant had no knowledge that the eviction application would proceed on 3 December 2015;

14.2 that the eviction application had not been served on the Municipality or the Department of Land Reform and Rural Development;

14.3 that *"the Court a quo erred in finding that the Deponent of the founding affidavit of the Appellant had the necessary authority to depose of (sic) the affidavit on behalf of the Appellant."* (The references to the Appellant here must have been intended to be references to the Applicant in the Court *a quo* and the Respondent on appeal.)

14.4 that the Respondent had failed to make out a case for the eviction of the Appellant in his founding affidavit;

14.5 that a whole host of provisions of ESTA had not been complied with, including section 9(3) which required a Probation Officer's report;

14.6 that the granting of the eviction order had not been just and equitable for a variety of reasons including *inter alia* the following:

14.6.1 "The Court a quo erred, in circumstances, when it was called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of (sic) an ongoing, stressful and law-governed process".

14.6.2 "The Court a quo should have, either, in accordance (sic) existing equitable principles applicable to evictions, in general, or in

accordance (sic) the applicable Statutory Instruments, find that the evictions (sic) application ought and/or should not have proceeded in the absence of the Appellant, at the time".

14.6.3 "The Court a quo should have find (sic) that it was 'just and equitable' or alternatively, that it was in the interest of all the parties concerned to afford the Appellant an opportunity to answer the averments contained in the Respondent's papers [the founding affidavit in support of the evictions (sic) application]."

15 It is apparent from what has been set out above that certain of the Appellant's grounds of appeal fly in the face of the record which establishes clearly that there was personal service of the eviction application on the Appellant (which stated in terms that the application was to be heard in the Worcester Magistrates Court on 3 December 2015) and that the eviction application was served on both the Municipality and the Department of Land Reform and Rural Development.

16 Counsel for the Appellant, Mr Tsegare, sought to explain these glaring discrepancies by stating that his attorney, Mr Elton Shortles of Elton Shortles Attorneys, had not been in possession of the record at the time that the notice of appeal had been drafted. This, said Mr Tsegare, was because the original record had been sent to this Court when the matter went on automatic review in terms of section 19(3) of ESTA.

17 Mr Shortles ought to have taken steps to obtain a copy of the record prior to drafting the notice of appeal. His failure to do so was unexplained. Alternatively, at the very least, once it became apparent from the record that certain of the

grounds of appeal were manifestly unsustainable, Mr Shortles ought to have taken steps to amend the notice of appeal. His failure to do this was also unexplained.

18 Counsel for the Respondent, Mr Joubert, submitted that even if Mr Shortles had not had access to the record, he ought to have consulted with the Appellant. Mr Joubert submitted that from the discrepancies between the record and the notice of appeal, it appeared that Mr Shortles had not done so and had in fact acted without instructions from his client. In response to this, Mr Tsegare told the Court that Mr Shortles had indeed consulted with the Appellant who had instructed him that the eviction application had not been served on him. I will return to this aspect below.

19 Mr Tsegare did not persist with the grounds of appeal relating to the service of the eviction application in argument.

20 As for the ground of appeal that the Respondent lacked the necessary authority to depose to the founding affidavit, the Appellant's representatives appear to have laboured under the misapprehension that the Respondent had purported to depose to the affidavit on Sandrivier's behalf. This is not correct. The Respondent deposed to the affidavit in his capacity as the person in charge of the Farm. Mr Tsegare indicated in Court that he would not persist with this ground of appeal in argument.

21 Mr Tsegare did however persist with the remaining grounds of appeal summarised above.

22 The first of these is the contention that the Respondent failed to make out a case for the eviction of the Appellant in his founding affidavit. This contention is without merit. As is clear from what has been set out above, the Respondent made the averments necessary in order to obtain an eviction order in terms of ESTA.[2] In the absence of opposition from the Appellant, there was nothing to gainsay those averments. In the circumstances, the Magistrate was entitled to accept them.[3]

23 On the matter of the Probation Officer's report, Mr Tsegare ultimately conceded that on the authority of the *Theewaterskloof* judgment referred to above, the Magistrate was not required to wait for the Probation Officer's report before determining the eviction application. As is evident from the record, the Magistrate also took into account, correctly in my view, that the eviction application was unopposed despite personal service on the Appellant. There is accordingly no merit in this ground of appeal.

24 It remains to deal with the Appellant's contention that the granting of the eviction order was not just and equitable. Some of the submissions in support of this contention have been quoted above. It is apparent that they are riddled with errors and not entirely coherent. In response to questioning from the Court as to what precisely was not just and equitable about the granting of the eviction order, Mr Tsegare made the rather startling submission that the Magistrate ought to have subpoenaed the Appellant before determining the application. Only then, submitted Mr Tsegare, would the Magistrate have had before her all the facts necessary to enable her to grant a just and equitable eviction order.

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[2] In terms of sections 8(2) and 9(2) of ESTA.
[3] See in this regard *Land en Landbouontwikkelingsbank van Suid Afrika v Conradie* 2005 (4) SA 506 (SCA) at para 15.

25 It is correct that in the implementation of social legislation such as ESTA, the Courts have a role to play that may, in appropriate cases, be more interventionalist than has been the case in terms of the traditional adversarial system. As the Constitutional Court held in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) it is in the context of social legislation necessary *"to infuse elements of grace and compassion into the formal structure of the law"* and courts need *"to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern."*[4]

26 However, it cannot conceivably follow from this that where an applicant for eviction has made the necessary averments in her founding papers and there is no opposition from the occupier despite personal service of the application, the judicial officer is required to subpoena the occupier before being entitled to determine the eviction application. Such a proposition is grossly disproportionate in terms of the respective parties' rights and would impose an unjustifiable additional burden on the already overburdened Magistrates' Courts. It accordingly falls to be rejected.

27 Ms Tsegare did not contend that there was any other respect in which the granting of the eviction order was not just and equitable and in my view there is none.

Costs

[4] At para 37. Quoted with approval in the recent Constitutional Court judgment of *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) at para 40.

28 ESTA is social legislation. As this Court has repeatedly said, provided that litigation under ESTA is reasonably justified and properly conducted, this Court will usually not make a costs order.[5] In this case, for the reasons set out above, I cannot hold that the appeal was reasonably justified or that it was properly conducted.

29 This is a case, where as this Court stated in *Ntuli v Smit,* the representatives for the Appellant:

> "launched a hit and miss application to this Court, raising every point they could think of, without proper regard to whether there was evidence to establish the necessary factual basis…."[6]

30 On their own version, the representatives for the Appellant noted an appeal without sight of record, which they ought to have obtained. At the very least, upon obtaining the record when it must have been clear to the Appellant's representatives that certain of their grounds of appeal were manifestly incorrect and unsustainable, they ought to have taken the necessary steps to amend the notice. They failed, without explanation, to do so. Although Mr Tsegare did not persist with these grounds of appeal in argument, he did persist with a number of other grounds, all of which were palpably unmeritorious.

31 Mr Joubert urged the Court, in the circumstances, to order costs against the Appellant's attorney *de bonis propriis* on the attorney and client scale.

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[5] *Hlatswayo and Others v Hein* [1997] 4 All SA 630 (LCC) at 639h, 642c, 642f, 643f -644c; *Ntuli and Others v Smit and Another* 1999 (2) SA 540 at para 25.
[6] At para 25.

32 Inept and shoddy though the noting and prosecution of the appeal has been, I accept Mr Tsegare's assurance that Mr Shortles did consult with the Appellant prior to drafting the notice of appeal. I also accept that the conduct of the Appellant's legal representatives has not been dishonest. For those reasons, I will not make a costs order on an attorney and client scale or *de bonis propriis.*

33 However, it is apparent that Mr Shortle's firm is involved in a number of land reform cases brought before this Court and that this is not the only case in which his firm's work has not been up to standard.

34 A similar situation prevailed in the case of *Ntuli v Smit* causing this Court to issue a warning to the firm concerned. It did so in the following terms:

> "In the matter of *Webb and Others v Botha*, the Natal Provincial Division had to consider a cost order *de bonis propriis* against an attorney who had the propensity of embarking on legal proceedings without prospects of success, mostly relying on technical points. The attorney was warned a number of times that in future he might be held liable *de bonis propriis* for the costs of such proceedings. He did not heed the warnings, and eventually a costs order *de bonis propriis* was made against him. I have decided to follow that approach, and to warn the firm representing the applicants that the time is fast approaching when it would be held liable *de bonis propriis* for the costs of proceedings where the papers are patently deficient and the prospects of success obviously absent. It distresses me having to do this because the firm is fulfilling an important function in representing indigent litigants in land reform measures. The importance of the litigation is, however, no excuse for substandard performance."[7]

35 The Appellant's representatives would do well to heed a similar warning.

36 I accordingly make the following order:

[7] At para 31.

1. The appeal is dismissed with costs.

2. Paragraphs 2 and 3 of the order granted by this Court on 27 January 2016 is set aside and substituted with the following:

   "2. That Franco Lee (the first respondent) is ordered to vacate the Farm by no later than 31 January 2017.

   3. In the event that the first respondent does not vacate the farm by 31 January 2017, the sheriff of the Court is authorised to evict the first respondent on 7 February 2017."

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H BARNES

Acting Judge

I agree and it is so ordered.

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N RAJAB-BUDLENDER

Acting Judge

Appearances:

For the Appellant: Adv C Tsegare instructed by Elton Shortles Attorneys

For the Respondent: Adv C Joubert SC instructed by Conradie Incorporated