IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case No.: LCC102/2014

Before: The Honourable Ngcukaitobi AJ

Heard On: 02 April 2016
Decided: 13 July 2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

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DATE SIGNATURE

In the matter between:

NEDERBURG WINES PROPRIETARY LIMITED Applicant

And

FRANS NERO First Respondent

FRANSOIWA BAADJIES Second Respondent

JERAET NERO Third Respondent

GERALDINE DU TOIT Fourth Respondent

VERONICA DU TOIT Fifth Respondent

ALL OTHER PERSONS RESIDING AT THE PROPERTY

AT HOUSE NUMBER 4 ON THE NEDERBURG ESTATE,

THE REMAINDER OF FARM 604, IN THE MUNICIPAL

AREA OF THE WINELANDS DISTRICT COUNCIL AND

REGISTRATION DIVISION OF PAARL Sixth Respondent

DRAKENSTEIN MUNICIPALITY Seventh Respondent

DEPARTMENT OF RURAL DEVELOPMENT AND LAND

REFORM Eighth Respondent

JUDGMENT: LEAVE TO APPEAL

NGCUKAITOBI AJ

1 The applicant has asked for leave to appeal against my judgment and order. In my judgment, I dismissed the unopposed application for the eviction of the respondents. My judgment has been criticised on the basis that I have applied the wrong legal test and incorrectly assessed the evidence.

2 In relation to the question of the test, it is worth referring back to section 10(1)(c) of the Exertion of Security of Tenure Act, 62 of 1997 (ESTA), which was the basis for the application. The requirement under that section is that a party seeking an eviction bears the onus to prove that a respondent has committed a fundamental breach of the relationship with the land owner, which cannot reasonably and practicably be restored.

3 This requirement has been considered in a number of decisions by this court. In my own judgment in *Statutis Trading (Pty) Ltd v Sibanyoni and Others* LCC86/2014 delivered on 12 June 2015 I tabulated the requirements under this section. The first is that the breach must be fundamental. What this requires is that the breach must damage the foundation of the relationship between owner and tenant. By this, the statute contemplates that certain breaches will not be serious enough to damage that relationship and as such will not be punishable by eviction. When a breach is fundamental is naturally a question of fact and it can be decided on a fact-by-fact basis. Once a breach has been determined to be fundamental there should be a further enquiry as to whether or not it is possible or practicable to remedy the breach. This part of the enquiry focuses not so much on the nature of the breach but on the conduct of the parties pursuant to an established breach.

4 While both requirements require some evidence, the second requirement is also evaluative. The attack on the test is in my view unfounded. My judgment might have expatiated the test to be applied, but it is a stretch to suggest that I have introduced a new test. It seems that, at any rate, I gave an interpretation to the provisions of the statute. Accordingly, it is my view that there is no basis to the suggestion that there is a reasonable prospect that the applicant would be successful on appeal in relation to the argument pertaining to the test.

5 The next question relates to the application of the test to the facts. The facts, as apparent from the founding papers illustrate the following.

5.1 The first respondent was employed by the applicant as an irrigator during July 1993. It is claimed that his right of residence emanated solely from his employment by the applicant. It has been acknowledged that pursuant to the right of residence, he was entitled to have his family, including his children, the second to fifth respondents, reside with him in his house.

5.2 It appears that during October 2008 the first respondent had alcohol dependency problems. He approached an organisation to assist him with his alcohol related problems. Consequently he was admitted to an alcohol rehabilitation programme for five weeks between October and November 2008. The payment for treatment was paid for by the applicant. An agreement was then signed in terms of which the applicant was given permission to administer random alcohol tests on the first respondent's body.

6 On 12 December 2011 an alcohol test was administered on the first respondent and he tested positive for alcohol in his blood stream.

7 A disciplinary hearing was then conducted on 19 December 2011. When the first respondent was charged for being under the influence of alcohol on duty he pleaded guilty to the charge and was dismissed from his employment.

8 After this, the right of residence of the first respondent was terminated. A referral to the Commission for Conciliation, Mediation and Arbitration by the first respondent resulted in a settlement agreement. The first respondent was

instructed to vacate the premises of the applicant by 30 November 2013, which he failed to do. A notice of eviction was sent noting that the reason for the eviction was the misconduct in that he had been tested positive for alcohol.

9 Despite the notice, the first respondent did not vacate. No further acts of misconduct are recorded other than drinking on duty. There are some allegations against the children of the first respondent, and in particular one of them is accused of having threatened an employee of the farm with acts of violence. The second and third respondents are allegedly frequently under the influence of drugs, and a charge of *crimen injuria* was apparently opened against the third respondent resulting from these threats on or about 25 November 2013.

10 No further allegations appear from the founding affidavit. No communication has been addressed specifically to the balance of the respondents, other than the first respondent. In my judgment I concluded that these facts did not meet the legal threshold as prescribed in section 10(1)(c) of ESTA. In particular, the single instance where the first respondent was found guilty of misconduct because alcohol was found in his blood stream was simply insufficient to warrant his ejectment from the property. Although the remainder of the respondents are accused of acts of misconduct, they are so lacking in specificity that the two-fold test contained in section 10(1)(c) of ESTA cannot be satisfied. In particular, insofar as the allegations are made against the children of the first respondent, no attempt has been made by the applicant to deal specifically with their situation or for that matter to attempt their eviction. This matter came up during oral argument, and the attorney who represented the

first respondent pointed out that since the first respondent enjoys a right to family life, it would not be preferable to evict his children who are accused of violent acts.

11 Nothing has been suggested to convince me that my assessment of the facts is wrong to the extent that an appellate intervention is warranted. As such, it is my view that there is no reasonable prospect that another court would arrive at a different conclusion in relation to my findings on section 10(1)(c) of ESTA.

12 The alternative suggestion was that section 10(3) of ESTA applies. In my interpretation of section 10(3)(a) – (c), I concluded that these sub-sections were peremptory and conjunctive. While I concluded that section 10(3)(a) and (b) had been satisfied, I was not satisfied that section 10(3)(c) has equally been. In particular, on the facts no evidence was produced to illustrate "*serious prejudice*" if the accommodation allocated to the first respondent was not given to another person. The first requirement is that there must be prejudice. By this, the statute at least intends to convey that there must be some evidence of a negative impact on the business operation of the applicant. But a negative impact alone is insufficient, since there should be a causal connection between the occupation of the farm by an occupier and the negative consequences to the operation of the business by the land owner. No facts here were set out to demonstrate this. Some argument was made that the matter ought to be self-evident from the papers. But I do not agree. It seems to me that where a party seeks to rely on section 10(3), it must at least put some evidence of prejudice that it is suffering. After all, the provisions of ESTA are protective in nature and in part give effect to section 25(6) and 26(1) of the Constitution. In order to

realise the objectives of ESTA, it must be construed strictly. The requirement of seriousness is also important. Prejudice must be illustrated to have been serious in order to justify eviction based on section 10(3). In the establishment of prejudice, a value judgment must be exercised, but there must at least be some evidence to illustrate the degree and extent of the prejudice.

13 The contents of the founding affidavit in my view did not satisfy this test. What was alleged was that the presence of the respondents in the premises is "*hindering the efficiency at which the applicant conducts its business*". Further, it was alleged that the applicant was "*materially prejudiced by the continuing occupation of one of its employee's houses by the respondents*". This was said to flow from the "*nature of the applicant's farm operations*", which mean that it is necessary for "*certain of its employees (for example its tractor drivers) to reside in the farm houses on the farm*". But these averments are not supported by the facts. This is a matter dealt with fully in paragraphs 25.1 to 25.4 of my judgment. Nothing has been stated in the application for leave to appeal to demonstrate that in the court of appeal there would be a likelihood of overturning that assessment.

14 In the circumstances, it is my view that there is no reasonable prospect that another court would arrive at a different conclusion. The application for leave to appeal is dismissed.

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NGCUKAITOBI AJ
Acting Judge of the Land Claims Court