REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NO: LCC05R/2017

MAGISTRATE'S COURT CASE NUMBER: 1418/2015

IN CHAMBERS

Before: **Poswa-Lerotholi, AJ**
Heard on: ……..
Delivered on: 09 May 2017

DELETE WHICHEVER IS NOT APPLICABLE

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

…… ……
DATE SIGNATURE

In the matter between

RAINBOW FARMS (PTY) LTD Applicant

And

HENRY STEVEN RHODES Respondent

Judgment

POSWA-LEROTHOLI AJ

Introduction

[1] This matter comes before me on a review in terms of 19(3) of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA").

[2] On 16 January 2017, the magistrate issued the following order –

> *"The court grants an eviction order against the Respondent. The Respondent must vacate the farm to wit Rainbow Farm Tierfontein 1, House No. […] on or before 31 March 2017. Should the Respondent fail to vacate the farm on or before 31 March 2017, the Sheriff of the Court Malmesbury is authorised and ordered to remove the Respondent after 7 April 2017."*

[3] The order was suspended pending automatic review before the Land Claims Court.

[4] Having read the record of proceedings in the Magistrate's Court, I cannot confirm the order made by the magistrate on 16 January 2017, for reasons, which will become clearer hereunder.

Background Facts

[5] In 1996 the respondent was employed by the applicant. In the course of his employment, the respondent rose through the ranks from poultry man to "acting farmer". At all material times, the respondent lived on the farm with his family. He was the only member of his family employed by the applicant. Following disciplinary proceedings he was dismissed in

2012 for misconduct.

[6] Subsequent to his dismissal, the respondent continued to reside on the property. On 12 December 2013 a lease agreement was concluded between the applicant and the respondent.

[7] The basis of the applicant's claim for eviction was that the respondent's right to residence had been terminated when the six-month lease agreement expired due to the effluxion of time. The respondent challenged the eviction both on procedural and substantive grounds; he contended that the applicant had failed to join the parties that had a direct and substantial interest. The applicant challenged the fairness of his dismissal and also claimed that as a long-term occupier, he had a legal right to continue living on the property.

[8] On 20 July 2015, the applicant sought an order for the eviction in terms of ESTA in the Magistrate's Court, District of Strand under case no. 3905/14.

[9] On 26 August 2016, the probation officers report was filed in terms of section 9(3) has shown that there is no alternative accommodation and opposed the eviction on the basis that it will render the respondent and his family homeless.

[10] The application was heard on 18 October 2016.

[11] I find that the Magistrate erred in a number of procedural and

substantive findings:

11.1 The non- joinder of Mrs Rhodes and their two adult children;

11.2 The application of section 11 instead of section 10 to the eviction of the respondent.

11.3 The fairness of the agreement;

11.4 Non-compliance with section 9(2)(a) and (b).

Joinder

[12] The respondent argued that Mrs Rhodes and two adult children had not been cited whereas, as long-term occupiers, they had acquired occupational rights. The applicant maintained that Mrs Rhodes was not an occupier in her own right as her right of residence arose from the respondent who had the primary right to reside on the farm.

[13] The magistrate concluded that the lease agreement contract had been concluded with the respondent and that it was the respondent who was in default. The magistrate does not advance legal principles to non-suit Mrs Rhodes and her adult children.

[14] *In Klaase and Another v van der Merwe N.O. and Other*s 2016 (9) BCLR 1187 (CC); 2016 (6) SA 131 (CC)("Klaase") at paragraph 45 the Constitutional Court laid down the principles governing joinder quoting from *International Trade Administration Commission v SCAW South*

Africa (Pty) Ltd 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) ("*ITAC"*) at para 11

> *"The test for joinder is that a party must have a direct and substantial legal interest that may be affected prejudicially by the judgment of the court in the proceedings concerned. In ITAC, this Court confirmed the test and said that a party seeking joinder must have a direct and substantial interest in the subject matter. The Court held that the overriding consideration is whether it is in the interests of justice for a party to intervene in litigation."(footnotes omitted)*

[15] The order sought by the applicant in paragraph 1 of the Notice of Motion is unequivocal-

> *"1. That the Respondent, together with all persons claiming any right of residence, or occupying, House [...], Rainbow Farm Tierfontein 1, Malmesbury, through the Respondent, be and is hereby evicted from the said premises."*

[16] It is common cause that the respondent lives on the above property together with Mrs Rhodes and at least two adult children. Unfortunately, there are no details on the papers before me regarding their further particulars. There can be no doubt that they will be directly affected by the order for eviction in that applicant seeks to an order of eviction against the respondent *"and all such persons claiming right of residence on the said premises through the Respondent…"* It is evident that Mrs Rhodes as well as the children had a direct and substantial interest in this matter.

[17] Mrs Rhodes and the two adult children are in a similar position to that of Mrs Klaase in *Klaase* where, the Constitutional Court upheld an application for joinder by the spouse whose husband was facing eviction proceedings on the following grounds:

> *"[45] Mrs Klaase has a direct and substantial interest in the relief sought against Mr Klaase. It is undisputed that she has lived on the farm, continuously and openly for at least 30 years, with the knowledge of the respondents. Her right to housing will be affected negatively if the eviction order is executed. It is apparent from the probation officer's report that Mrs Klaase, together with her children and grandchildren, will be rendered homeless because of the unavailability of alternative accommodation if evicted. The Land Claims Court did not have regard to these relevant circumstances when determining the joinder application. Neither did it consider the provisions of section 3(4) and (5) of ESTA, in terms of which a person in the position of Mrs Klaase would be presumed and deemed to have consent of the owner if she has continuously and openly resided on land with the knowledge of the owner.*
>
> *[47] Mrs Klaase should have been cited as a party or joined in the eviction proceedings against Mr Klaase. Separate substantive grounds for her eviction should have been alleged and eviction should have been sought specifically against her. That did not happen.*

[48] The Land Claims Court erred in dismissing Mrs Klaase's application for joinder. That order should be set aside. In my view, the Land Claims Court should have joined Mrs Klaase and varied the terms of the eviction order in so far as it pertained to her."

[18] The necessity for the joinder of Mrs Rhodes in particular became apparent when the inquiry into whether the respondent could afford alternative accommodation. The magistrate acknowledged that there was insufficient evidence before court regarding the employment of Mrs Rhodes. The respondent averred that Mrs Rhodes was a nurse, and on this basis the magistrate declared that the court could take judicial notice of the fact that all nurses earn an income that is in excess of the prescribed amount, currently R5000.00 per month. In granting the eviction, the magistrate took into consideration the income of Mrs Rhodes and made a finding that the respondent could find alternative accommodation. The magistrate simply concluded that the eviction of Mrs Rhodes found application under PIE not ESTA. The court a quo, erred in so doing as there was no conclusive evidence before court relating to the income of Mrs Rhodes.

[19] I hold that the magistrate erred in finding that it was not necessary to join the rest of the occupants in the respondent's household.

Whether respondent's wife and children are occupiers

[20] Mrs Rhodes and children have resided on the farm with the respondent since 1996. *Prima facie*, they are long-term occupiers in their own right as they lived on the property with the consent and knowledge of the owner. Sections 3(4) and (5) of ESTA do not preclude persons who have never been employed on the property, but simply acknowledge that any person who resides on property for over a year is presumed to have done so with the consent of the owner. Moreover, if a period of three years or more of undisturbed possession lapses, the consent of the owner is deemed.

[21] The particular circumstances of the persons facing eviction are not within the knowledge of the court. As aforestated, the respondent's family ought to have been afforded the opportunity to present their situation in order for the court to interrogate and determine the status of each of member of the respondent's household, vis a vis the ESTA eviction.

[22] In accepting the allegation that the applicant is a nurse that earns more than R5000.00 a month, the magistrate made assumptions, which are not supported by any credible evidence. In any event, the magistrate was in no position to determine with any certainty whether the occupation of Mrs Rhodes's and the particular circumstances of the adult children are occupiers within the meaning of ESTA.

[23] Similarly this court cannot make a conclusive finding on the status of Mrs Rhodes and her children.

The section applicable in the eviction of the respondent

[24] The magistrate wrongly concluded that it was common cause that the respondents resided on the farm from 1997 and that therefore section 11 applies in the eviction. There is no evidence to support this conclusion in the record.

[25] At page 3 paragraph 7 of the founding affidavit, Werner Erich Schwimmbacher avers–

> *"The Respondent was employed by the applicant on 1 March 1996, as a Poultryman, and progressed to the title of Acting Farmer. Arising solely from his employment contract with the Applicant at the time the Respondent was given the right to reside in a house situated on the Applicant's said farm."*

In the opposing affidavit, the respondent admits the allegation.

[26] During the opening address, the applicant's attorney, Mr Avenant states that-

> *"It is common cause that the respondent took up residence on the applicants farm before the 4th of February 1997 and so the eviction is in terms of section 10."*[1]

[27] In the circumstances, it is patently clear that contrary to the magistrate's assertion, the parties were *ad idem* that the respondent resided on the farm before 4 February 1997. Due to this incorrect assertion, the

[1] Page 2 lines 4-7 of the transcript

magistrate then found that section 11 applied to the eviction of respondent. The Magistrate made an alternative finding that in the event the reviewing judge finds that she has reached the wrong conclusion, the applicant has satisfied the requirements of section 10 as well. Such cursory reference falls woefully short of a courts duty to grant an order that is just and equitable in interrogating these issues.

[28] This erroneous finding prejudiced the respondent in that the applicant had to meet the lower threshold in section 11. Section 10 relates to persons who were occupiers as at 4 February 1996, whilst section 11 of relates to persons who became were occupiers after 4 February 1997. These are two distinct provisions with distinct requirements; section 10 sets out more stringent requirements.

[29] In summary, the pre-requisites for prescription in terms of section 10 are the following:

29.1 Firstly, section 10(1)(a)-(c) relates to the conduct of the long-term occupier. The relationship between the occupier and the owner, whether the occupier is in breach of his or her duties and obligations and has failed to remedy the breach despite due notification from the owner or person in charge.

29.2 Secondly, section 10(1)(d) provides for instances where the occupier who was an employee and his right of residence arose solely from the employment contract and the occupier has voluntarily resigned.

29.3 Thirdly, section 10(2) stipulates that where there has been no breach or resignation but the court is satisfied that suitable alternative accommodation is available to the occupier.

29.4 Fourthly, section 10(3) makes provision for the non-availability of suitable alternative accommodation within nine months of the termination of the right of residence, but *"the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or the person in charge"*.

[30] In a nutshell, section 11 makes provision for an occupier whose right to residence has been terminated by the effluxion of time. Section 11(3) enumerates the factors the court should take into consideration when determining whether its just and equitable to grant an order of eviction:

30.1 the period that the occupier has resided on the land in question;

30.2 the fairness of the terms of any agreement between the parties;

30.3 whether suitable alternative accommodation is available to the occupier;

30.4 the reason for the proposed eviction; and

30.5 the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.

[31] Section 9(2) authorises the court to make an order of eviction in the following circumstances-

31.1 the right of residence has been terminated in accordance with the provisions of section 8;

31.2 the occupier has not complied with the notice to vacate;

31.3 the conditions for an order for eviction in terms of section 10 or 11 have been complied with.

31.4 the owner has given two months notice to the occupier as well as the relevant local, provincial and national authorities of his or her intention to pursue eviction proceedings.

Due to the finding that there has been substantial non-compliance with section 9(2)(a) and (b), it is not necessary to deal with the other provisions as the requirements for compliance with section 9(2) are cumulative.[2]

Termination of the right of residence

[32] Section 9(2)(a) enjoins a court determining an application for eviction to do so only if the right of residence has been terminated in accordance with section 8, which makes provision for both procedural fairness as well just and equitable substantive grounds for the termination of residence.

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[33] *In Snyders & Others v De Jager & others* (Appeal) (CCT186/15) [2016] ZACC 55 (21 December 2016) at para 57 the Constitutional Court held that an owner of land who relies on 8(2) of ESTA to justify the termination of an occupier's right of residence, bears the onus to prove that the termination of the occupier's employment related to the occupier's conduct as an employee and that it was effected in accordance with a fair procedure as required by section 188(1)(b) of the LRA.

[34] Due to the fact that the magistrate had incorrectly found that the lease agreement was fair, she concluded that section 8(2) was applicable to the respondent. I have found that the agreement does not comply with section 9(2)(a) and therefore the question remains about the status of the respondent.

[35] It is not in dispute that the right of residence on the property initially arose from his employment with the applicant. Following disciplinary action, the respondent was dismissed in September 2012, and continued to reside on the property without any interference from the applicant. It was only in December 2013, over a year later that the applicant purported to conclude a lease agreement with the respondent.

[36] In the circumstances, subsequent to respondent's dismissal, the presumption in section 3(4) was triggered and the respondent's right of residence no longer arose solely from employment as contemplated in section 8(2) but by consent. Section 3(4) provides-

" For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved."

[37] In *Barnard v September and Others* Case No. LCC 71R/2016(unreported) at paragraph 10, this court held that

"A preliminary question in relation to section 8 is whether sections 8(2) and section 8(3) apply to the Respondents. These sections apply if they were employees and their right of residence arose solely from their employment relationship. This is not the situation. When the Appellants purchased the farm in June 2009, the first Respondent and her family were occupying the labourer's cottage, and he agreed to allow them to continue to do so. Their right to reside was thus based on consent and continued as such until 2013 when the lease came into being. In this regard section 3 of ESTA includes the following relevant subsections:

(4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.

(5) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge.

[38] The respondent in this matter is in a similar position to that of the

respondents in *Barnard* quoted above. Following the reasoning of the court in *Barnard,* the magistrate wrongly found that section 8(2) and 8(3) applied to the respondent in that subsequent to respondent's dismissal, the presumption in section 3(4) was triggered and the respondent's right of residence no longer arose solely from employment as contemplated in section 8(2) but by consent.

[39] I find that the failure to give due consideration to the more stringent requirements of section 10 led to an eviction being granted on the limited conditions of section 11.

The fairness of the agreement

[40] With regard to the fairness of the agreement, the magistrate simply states: *"The terms of the lease agreement was fair."* The applicant alleged that the parties concluded a lease agreement for the duration six months, from 1 December 2013 to 31 May 2014. In the answering affidavit the respondent acted nonchalant at the time the agreement was concluded as he glibly states that he did not familiarise himself with all the provisions of the agreement.

[41] The lease constituted a waiver by Mr Rhodes of his right to a just and equitable termination of his right of residence as envisaged in section 8 of ESTA. Section 25(1) of ESTA provides:

> "25*(1)* *The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is*

permitted by this Act or incorporated in an order of a court."

[42] In *Barnard* the court held at paragraph 14;

"Not only did the lease agreement constitute a waiver and limitation of the first respondent's rights by bypassing the requirements of Section 8(1) of ESTA, but it unilaterally, without the appellant affording the First respondent the opportunity to make representations under Section 8(1)(e), substituted her right of residence flowing from consent with a right of residence flowing from a fixed time lease agreement. The lease agreement was, in the circumstances not fair, and therefore contrary to Section 8(1)(a) of ESTA."

[43] The above reasoning applies with equal vigour herein.

[44] For the reasons set out above, I conclude that the judgment is fundamentally flawed due to non-compliance with section 9(2), consequently, it is just and equitable, and in the interests of justice, that the order is set aside.

[45] I grant the following order:

1. The order is amended to set aside the eviction.

S POSWA-LEROTHOLI

Acting Judge of the Land Claims Court