
SOUTH AFRICA / JUDGMENT

Botha v Mtholo and Others (LCC 25R/2018, 157/2016) [2018] ZALCC 28 (12 September 2018) [2018] ZALCC 28

COURT

Land Claims Court

BEFORE

Canca

CASE / FILE NUMBER

LCC 25R/2018

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Before: Canca AJ

CASE NO.: LCC 25R/2018

MAGISTRATE'S COURT CASE NO: 157/2016

In the matter between:

LOUIS CHRISTIAAN BOTHA Applicant

And

MIKA MTHOLO

First Respondent

MIKA MTHOLO N.O.

Second Respondent

ALINA MTHOLO

Third Respondent

PHUMELELA LOCAL MUNICIPALITY Fourth Respondent

DEPARTMENT OF RURAL DEVELOPMENT AND Fifth Respondent

LAND REFORM

Delivered: 12_ September 2018

REVIEW JUDGMENT

CANCA AJ

- [1] This is an automatic review of a judgment of the Vrede Magistrates Court dated 26 April 2018. The applicant successfully sought the eviction of the first to third respondents (“the occupier respondents”) in terms of the Extension of Security Tenure Act 62 of 1997 (“ESTA”), from the farm known as The Remainder of the farm Magdalena 489, District Vrede, Free State Province (“the farm”). In granting the application, the court a quo found that the applicant had complied with the relevant provisions of ESTA and that it would, in the circumstances, be just and equitable that the occupier respondents be evicted from the farm.
- [2] The occupier respondents opposed the application and were, as was the case with the applicant, legally represented at the hearing. Comprehensive heads of argument were filed by both parties.

Parties

- [3] The applicant is the owner and person in charge of the farm having acquired ownership of same on 29 August 2006. The first respondent, an adult male, was born on the farm on 22 July 1953 and who appears to have worked there his entire adult life. He is also cited as the second respondent in his capacity as the guardian and father of minor children staying with him on the farm. The third respondent is his wife. The fourth and fifth respondents are, respectively, the local authority under whose jurisdiction the farm falls and the Government department vested with certain powers in matters involving ESTA.

Status of the first respondent

- [4] The court a quo, in granting the eviction application, found, inter alia, that (a) the first respondent had contravened the provisions of section 6 of ESTA[1] and (b) because his right of residence on the farm was linked to his contract of employment, that right ceased when his employment was terminated. In arriving at the first conclusion, the Magistrate relied on the first respondent’s conviction for a murder which took place at his residence on the farm. He is currently serving a sentence of 10 years imprisonment at the Standerton Prison. In addition, the Magistrate relied on the expert evidence of a Dr. Dreyer that the camp where the first respondent grazed his approximately 40 head of cattle was overgrazed and was contravening the provisions of the Conservation of Agricultural Resources Act, 43 of 1983 (“CARA”).
- [5] It cannot be disputed that an occupier who commits murder, particularly at the occupier’s place of employment is such a serious act that the relationship between that occupier and the owner or person in charge would be fundamentally breached, as was alleged by the applicant. The first respondent’s refusal to reduce his livestock so as not to contravene CARA also added to the strain in the protagonists’ relationship.

- [6] Whilst I agree that there has been a contravention of CARA, I do not agree with the finding that the first respondent's right to residence was tied to his employment. Having been born on the farm, the first respondent's right of residence did not stem exclusively from his employment relationship but also from consent to reside with his parents, which preceded his employment. He therefore had consent which flowed from another right in law. See *Snyders and Others v De Jager and Others* 2017 (3) SA 545 (CC) where the Constitutional Court held that it is not enough for an owner to comply with the provisions of section 8(2) when the occupier's right to residence does not stem solely from his employment. The applicant therefore had to comply with the provisions of section 8(1) as well.
- [7] Although I agree that the first respondent's right of residence should be terminated, I do so for reasons other than those proffered by the court a quo.
- [8] According to section 8(1) of ESTA, termination of an occupier's right of residence must, inter alia, be just and equitable. Section 8(1) reads as follows:
- "8. Termination of right of residence. – (1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-*
- (a) The fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
 - (b) The conduct of the parties giving rise to the termination;
 - (c) The interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
 - (d) The existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
 - (e) The fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence."
- [9] Section 8(1) requires the Court to consider "all relevant factors and in particular" the criteria in sub-paragraphs (a) to (e). I only intend to discuss sub-paragraphs (c) and (e) in this judgment having considered the provisions of sub-paragraphs (a), (b) and (d).
- [10] As regards sub-paragraph (c), there can be no dispute that, when viewed objectively, the hardship which the applicant will suffer outweighs that of the first respondent. This is so, firstly, because the applicant is unable to make the residence available to others employees whilst it is allocated to the first respondent who will possibly remain at the Standerton prison as an inmate for the next 10 years. He, personally, therefore has no need for the residence. Secondly, the applicant, because of the first respondent's

refusal to limit his cattle, faces the possibility of being found guilty of contravening the country's environmental laws,

including CARA.

[11] As regards sub-paragraph (e), the Constitutional Court, in *Snyders supra*, clarified the nature of the enquiry when interpreting this sub-paragraph. *Snyders* held that:

“Section 8(1) makes it clear that the termination of a right of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirement for the substantive fairness of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable. The requirement for procedural fairness is captured in section 8(1)(e).”

Although the record does not show that the first respondent was granted an opportunity to “make representations why his ... right of residence should not be terminated” as set out in *Snyders*, I am of the view that, in the circumstances of this particular case, not having granted him that opportunity was not unjust.

[12] In the light of all of the above, I find that the eviction of the first respondent from the farm was just and equitable.

Status of the second to third respondents

[13] It is not disputed that the third respondent has openly resided on the farm and that she was employed as a domestic worker by the previous owner. She also worked on a temporary basis for the applicant. She had consent to be on the farm.

[14] It was argued on behalf of the applicant that the third respondent cannot have independent protection of ESTA as she was not an occupier in her own right. According to the applicant, her right of residence stemmed from that of her husband, the first respondent. The court a quo accepted this argument and found that the third respondent was not an occupier in her own right and therefore her right of residence “is linked to that of the first respondent.”

[15] According to *Klaase and Another v Van der Merwe NO and Others* 2016 (6) SA 131 (CC), persons such as the third respondent are no longer regarded as residents who occupy under the rights of the head of the household. *Klaase* found that they are occupiers whose rights of residence flowed from consent in terms of sections 3(4) and 3(5) of ESTA.[2] See *Goedverdiend Plase (Pty) and Others v Andrews and Another* LCC 232/2017 (22 February 2018) at paragraph 14 – 18 where Meer AJP considered the decision in *Klaase*.

[16] The finding by the Court a quo that “It is thus the Court’s ruling that the third respondent is not an occupier in her own right and that her right of residence is linked to that of the first respondent” is counter to the principle established in *Klaase* which applies in respect of the third respondent irrespective of the agreement regarding accommodation entered into by her husband and the applicant. The Magistrate clearly erred in reaching this finding.

[17] There is no evidence in the record that there are any minor children residing with the occupier respondents. It is in the light of all of the above that I make the order below.

[18] The following order is made:

The order granted under case no 157/2016 by the Magistrate, Vrede on 26 April 2018 is set aside and substituted with the following order:

- (a) The application for an eviction order against the first respondent succeeds.
- (b) The application for an eviction order against the third respondent is dismissed. In the event that there are minor children residing with the third respondent, then in that event, the application for an eviction order against them is also dismissed.
- (c) No order is made as to costs.

MP Canca

Acting Judge, Land Claims Court

Appearances:

For the applicant:

Niemann Grobbelaar Inc.

Bethlehem.

For the first, second & third respondents: Matsepes (Goldfields) Inc.

Odendaalsrus.

- [1] The relevant provisions of section 6(3) read as follows: “An occupier may not (a) Intentionally or unlawfully harm any other person occupying the land; (b) Intentionally cause material damage to the property or person in charge...”
- [2] Sections 3(4) and 3(5) read as follows: “3(4) For 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. 3(5) For purposes of civil proceedings in terms of the 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 the person in charge.”

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