
SOUTH AFRICA / JUDGMENT

Breytenbach N.O. and Another v Mokoena and Others (46R/2016) [2016] ZALCC 25 (27 September 2016) [2016] ZALCC 25

COURT
Land Claims Court

BEFORE
Barnes

CASE / FILE NUMBER
46R/2016

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case Number: 46R/2016

In the matter between:

JACOBUS JOHANNES BREYTENBACH N.O. First Applicant

PHILLIP THEUNISSEN N.O.

Second Applicant

and

MAKGALA JOYCE MOKOENA

First Respondent

MAKGALA JOYCE MOKOENA N.O. Second Respondent

MODISE SHADRACK MOKOENA

Third Respondent

DIHLABENG MUNICIPALITY

Fourth Respondent

DEPARTMENT OF RURAL DEVELOPMENT Fifth Respondent

AND LAND REFORM

Date of Judgment: 27 September 2016.

JUDGMENT:

AUTOMATIC REVIEW

BARNES AJ

1 This is a referral from the Magistrate's Court for the District of Fouriesburg, in terms of the provisions of section 19(3) of the Extension of Security of Tenure Act 62 of 1997 ("ESTA").

2 On 30 May 2016, the Magistrate's Court granted an application for the eviction of the First to Third Respondents and all persons claiming right of residence through them from the farm known as Lorenzo 356 in the district of Fouriesburg in the Free State ("the Farm"). The Magistrate ordered the First to Third Respondents to vacate the Farm by 15 December 2016, failing which he authorized the sheriff to carry out their eviction.

3 The First Respondent is Ms Makgala Mokwena. She is cited as the First Respondent in her personal capacity and as the Second Respondent in her capacity as the guardian of her three minor children. The Third Respondent is Ms Mokwena's 19 year old son. Where I refer to the First to Third Respondents collectively I will refer to them simply as "the Respondents".

4 Ms Mokwena moved onto the Farm with her husband, Mr Molantwa Simon Mosholiba, in November 2006. Mr Mosholiba was employed on the Farm as a general labourer. On 8 October 2014, Mr Mosholiba passed away.

5 Thereafter, the Applicants sought to evict the Respondents from the Farm. In July 2015, the Applicants served the Respondents with a Notice in terms of section 9(2)(d) of ESTA. The Notice recorded that the Respondents' right of residence had been terminated in terms of section 8(2) of ESTA which provides as follows:

"The right of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act."

6 The Applicants terminated the Respondents' right of residence in terms of this section on the basis that:

"In that your right of residence was coupled to the right of residence of the late Mr Molantwa Simon Mosholiba, who passed away on 18 October 2014, in terms of an employment agreement signed on 1 November 2006.

In that the late Mr Molantwa Simon Mosholiba passed away, you have no right to further reside on the farm....."

7 The Respondents did not vacate the Farm on receipt of the section 9 Notice and the Applicants accordingly brought an application for their eviction. In their eviction application, the Applicant pleaded as follows:

“There were expressly agreed upon between myself and Mr Molantwa Simon Mosholiba that only Mr Molantwa Simon Mosholiba and his spouse, the First Respondent and their minor child, the Third Respondent are allowed to reside on the property of the Applicant as long as Mr Molantwa Simon Mosholiba are (sic) in my service. By termination of Mr Molantwa Simon Mosholiba’s service agreement himself, as well as any other person he have (sic) allowed to reside with him on the property are terminated and they must vacate the property immediately.”

8 In support of this, the Applicants attached an employment agreement and a housing agreement concluded between Mr Mosholiba and Mr Breytenbach. These agreements do not, however, bear out the Applicants’ averments quoted above. The employment agreement is silent on the matter of accommodation. The housing agreement, which makes provision for Mr Mosholiba’s accommodation, provides that it arises out of the employment relationship between the parties and terminates automatically upon the termination of the employment relationship. Neither agreement explicitly regulates the consequences for Mr Mosholiba’s family of the termination of his employment on the Farm.

9 In their eviction application, the Applicants pleaded further as follows:

“Mr Molantwa Simon Mosholiba passed away on 18 October 2014, while Mr Molantwa Simon Mosholiba and the First Respondent were residing on the property. As a result of the death of Mr Molantwa Simon Mosholiba the service agreement were (sic) terminated and did (sic) the First until the Third Respondent no longer have the right to occupy the property.”

10 The Respondents opposed the eviction application. In their opposing affidavit they denied knowledge of the employment agreement or the housing agreement or the contents thereof. The Respondents admitted that “the right of residence of the First to Third Respondents were derived from the right of residence of the late Moloantwa Simon Mosholiba.” Furthermore and importantly, while the Respondents admitted that Mr Mosholiba’s employment had terminated by virtue of his

passing, they denied that their right of residence on the Farm had been terminated as a result. The Respondents pleaded that Ms Mokwena had been employed on the Farm by the Applicants as a casual worker during harvest times. Finally, the Respondents pleaded that their eviction would not be just and equitable as Ms Mokwena and her major son were unemployed and there was no alternative accommodation available to them.

11 The Magistrate ruled that that there were no factual disputes on the papers and that it was unnecessary to hear oral evidence. The eviction application was therefore argued on the papers.

12 In his judgment, the Magistrate held that the following important fact was common cause between the parties:

“That the First to Third Respondents are not occupiers in their own right and that their right of residence was coupled to the right of residence of the late husband of the First Respondent, Mr Molantwa Simon Moshooliba.”

13 Flowing from this finding, the Magistrate held that the Respondents’ right of residence terminated when Mr Moshooliba’s employment terminated by virtue of his passing. The Magistrate then concluded as follows:

“This means that in terms of the agreement that was entered into by the Applicant and First Respondent’s husband in relation to the respondents’ right to occupy Applicant’s farm, the respondents should have left the applicant’s farm on or immediately after 18 October 2014 [the date of Mr Moshooliba’s passing].”

14 The Magistrate’s finding that there were no disputes of fact on the papers and therefore no need to hear oral evidence was not correct. Nor was his finding that it was common cause that the Respondents’ right of residence was coupled to the right of residence of Mr Moshooliba correct. What the Respondents conceded was that their right to reside on the Farm was derived from Mr Moshooliba’s right to reside on the Farm. The Respondents denied in terms however, that their right to reside on

the Farm was terminated by the termination of Mr Moshooliba’s right. As has been set out above, the Magistrate’s conclusion flowed from his initial finding that it was common cause that the Respondents’ right to reside on the farm was coupled – in all respects – to Mr Moshooliba’s right to do so.

15 While the Magistrate’s judgment does not accurately reflect the Respondents’ pleaded case, it does accurately reflect the legal position which prevailed at the time in relation to the distinction between “occupiers” and “residents” under ESTA. That distinction was established by the Land Claims Court in the judgment of *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) (“Klaasen”). In *Klaasen*, the Court held that the term “occupier” in ESTA is used in a narrow and a wide sense:

“The narrow one being applicable only to persons who have the consent of the owner or person in charge of the property or have another right in law to reside thereon. The wide sense refers to those who derive their right of residence through or under occupiers in the narrow sense. The persons falling within the latter groups are not occupiers in terms of ESTA. It is probably easier to distinguish between the two classes of ‘occupiers’ by using the term ‘occupier in their own right’ for persons to whom the eviction procedures of ESTA apply and, and to the others as ‘residents.’ The right of an ‘occupier in his own right’ to stay on a farm derives from the consent given by the owner or person in charge of the farm, while the right given to a ‘resident’ to stay on the farm derives from a different source, usually a family relationship with an ‘occupier in his or her own right.’”[1]

16 In this case, the Magistrate clearly applied what I will refer to as “the Klaasen distinction” to the application before him and cannot be faulted for doing so. The Klaasen distinction so applied meant that the Respondents were not “occupiers” under ESTA but were rather “residents.”

As residents, the right of the Respondents to reside on the Farm existed only through the right of Mr Moshooliba which right terminated on his passing.

17 The legal position has however recently changed. In a judgment handed down on 14 July 2016, the Constitutional Court, in *Klaase and Another v Van der Merwe N.O and Others*

[2016] ZACC 17, examined the Klaasen distinction and ruled that it reflected an erroneous interpretation of ESTA.

18 The Constitutional Court held that the Klaasen distinction reflected an impermissibly narrow interpretation of the term “occupier” in ESTA:

“It impermissibly construed the definition of ‘occupier’ narrowly and without regard to the mischief ESTA sought to remedy.

The narrow meaning does not take into account instances, like those in this case, where an occupier has lived for more than the

prescribed period on the premises with the knowledge of an owner who sits back and does not seek the occupier’s eviction. There the ESTA presumption and deeming provision favour the occupier. If the construction of ‘occupier’ adopted by the land Claims Court is – in the circumstances of this case - correct, occupiers like Mrs Klaase will be evicted arbitrarily from farms without being afforded their constitutional guarantees and their protection under ESTA.”[2]

19 The Constitutional Court also held that the Klaasen distinction reflected an overly narrow interpretation of the term “consent” in ESTA:

“The Land Claims Court’s finding that the ESTA occupier must be residing with ‘apparent consent’ and ‘without any other right to do so’ is not supported by the wording of ESTA which requires only that an occupier must reside with ‘consent or another right in law to do so.’ The restricted meaning of consent is not justified. The breadth of the concept of ‘consent’

in section 3 of ESTA is not insignificant.”[3]

20 In the case before it, the Constitutional Court found that it was undisputed that Mrs Klaase had lived on the farm openly and continuously for many years with the knowledge of the owners:

“By his own admission in the answering affidavit, the second respondent said that Mrs Klaase came to live with her prospective husband in a house that had been made available to him on the premises. There is no evidence to rebut the presumption that the respondents consented to Mrs Klaase’s residing on the farm. The respondents’ failure to object to Mrs Klaase’s residing on the farm for decades or taking steps to evict her is telling. It implies that they consented to her occupancy.”[4]

21 The Constitutional Court concluded that Mrs Klaase was an occupier under ESTA and was accordingly entitled to the protections afforded by ESTA in her own right. The Constitutional Court noted that the first requirement under ESTA was that Mrs Klaase’s right of residence be terminated on lawful grounds, provided that such termination was just and equitable, having regard to certain listed factors. Because Mrs Klaase had not been treated as an occupier under

ESTA in her own right, this had never been done. Mrs Klaase's right of residence had accordingly not been terminated and she was therefore entitled to remain in occupation of the farm. The Constitutional Court ruled as follows in this regard:

"In my view, Mrs Klaase has made out a case that she is an occupier in terms of ESTA. As an occupier, Mrs Klaase is entitled to the protections set out in ESTA. An eviction order may be granted against her only if certain conditions are met. The first is that her right of residence must have terminated on lawful grounds, provided that the termination is just and equitable, having regard to certain listed factors. So, for as long as the right of residence of an occupier like Mrs Klaase has not been terminated in terms of section 8, the occupier may stay. Obviously, section 8 has not been complied with and there was no suggestion that it was. It follows that Mrs Klaase's right of residence was not lawfully terminated. It is accordingly unnecessary for us to consider whether her consent to reside on the property was subject to any conditions, such as the continuation of her marriage or Mr Klaase's continued employment. It is also unnecessary to consider whether, if proper notice had been given, her eviction would have been just and equitable."[5]

22 The facts in this case are strikingly similar to those in *Klaase*. The Respondents aver that Ms Mokwena and her children lived openly on the Farm and that Ms Mokwena worked on the Farm – albeit on a casual basis during harvest time. The Respondents aver further that their right of residence on the Farm was not terminated by virtue of the termination of Mr Mosholiba's right. Therefore, in line with *Klaase*, the Respondents have made out a case that they are occupiers under ESTA and are entitled to its protections in their own right.

23 As the Constitutional Court recognised in *Klaase*,^[6] there may well still be cases where one person's right to occupy a farm is conditional upon another person's right to do so. But this would now need to be proved on the facts. It would no longer be the case merely by application of the now defunct interpretative distinction established in *Klaasen*. In the present case, the employment agreement and housing agreement concluded between Mr Mosholiba and the Applicants regulate the position of Mr Mosholiba only. They do not regulate the consequences for Mr Mosholiba's family in the event of the termination of his employment on the Farm. They accordingly take the matter no further.

24 In any event however, this is a case where, as in *Klaase*, the very first requirement under ESTA, viz that the Respondents' right of residence be lawfully and fairly terminated, has not been met. As has been set out above, the Applicants purported to terminate the Respondents' right of residence in terms of section 8(2) of ESTA. They did so on the basis that the Respondents were mere residents, whose fate was linked ineluctably to that of Mr Mosholiba, and without an appreciation (which was quite understandable at the time) that the Respondents could be occupiers under ESTA in their own right.

25 In terms of the current legal position, termination of the Respondents' rights of residence purely on the basis that they qualified as "residents" under the now defunct Klaasen distinction, can no longer be regarded as lawful. Nor, in my view, can it be regarded as just and equitable. I am therefore of the view that the Respondents' rights of residence were not lawfully and fairly terminated in terms of ESTA. That being the case, it is unnecessary to consider whether the further requirements of ESTA were met.

26 Given my above finding, it would serve no purpose to refer the matter back to the Magistrate for reconsideration. The Respondents' right of residence not having been validly terminated, they are entitled to remain in occupation of the Farm. Should the Applicants seek the eviction of the Respondents in future, they would need to terminate their rights of residence afresh, in a manner consonant with the current legal position.

27 I reiterate that, given the legal position which prevailed at the time, neither the Magistrate nor the Applicants can be faulted for dealing with the matter in the way that they did. It would therefore be inappropriate to make a costs order.

28 In the circumstances, I make the following order:

1. The judgment and order of Magistrate Jikeka handed down on 30 May 2016 under case number 75/2015 is set aside and replaced with the following:
 - a. The eviction application is dismissed.
 - b. There is no order as to costs.

H BARNES

Acting Judge

[1] At para 23.

[2] At para 54.

[3] At para 57.

[4] At para 60.

[5] At para 65.

[6] See para 65.

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