

SOUTH AFRICA / JUDGMENT

Colchester Zoo SA Properties (Pty) Limited v Mdakane and Others (1108/2017) [2018] ZASCA 188 (13 December 2018) [2018] ZASCA 188

COURT

Supreme Court of Appeal

BEFORE

Maya, Mathopo, Van der Merwe, Makgoka, Carelse

CASE / FILE NUMBER

1108/2017

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1108/2017

In the matter between:

COLCHESTER ZOO SA PROPERTIES (PTY) LIMITED APPELLANT

and

MANTOMBI MAURINE MDAKANE FIRST

RESPONDENT

SIFISO MADUNA SECOND RESPONDENT

DIRECTOR GENERAL OF THE DEPARTMENT

OF RURAL DEVELOPMENT AND LAND

REFORM THIRD

RESPONDENT

Neutral citation: Colchester Zoo SA Properties (Pty) Ltd v Mdakane & others (1108/17)

[2018] ZASCA 188 (13 December 2018)

Coram: Maya P, Mathopo, Van der Merwe and Makgoka JJA and Carelse AJA

Heard: 16 November 2018

Delivered: 13 December 2018

Summary: Land – land reform – whether second respondent an occupier in terms of Extension of Security of Tenure Act 62 of 1997 – whether eviction order should be granted.

ORDER

On appeal from: On appeal from the Land Claims Court, Randburg (Yacoob AJ, sitting as court of first instance):

1 The appeal is upheld to the extent that paragraphs 2 and 4 of the order of the Land Claims Court are set aside.

2 The appellant's claim for eviction of the second respondent is referred to the Land Claims Court for determination.

3 There is no order as to the costs of the appeal (including the costs of the application for leave to appeal).

Carelse AJA (Maya P, Mathopo, Van der Merwe and Makgoka JJA concurring)

[1] The main issues in this appeal, with the leave of the Land Claims Court (Yacoob AJ), are whether Mr Maduna, the second respondent is an 'occupier' in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and if he is not, whether he should be evicted from the farm Geluk (farm) in KwaZulu-Natal. These issues must be determined against the following background facts.

Background

facts

[2] On 7 April 2015, the appellant became the registered owner of the farm. On 24 August 2015, both Ms Mdakane, the first respondent and, the second respondent launched an action in the Land Claims Court for an order to be declared labour tenants in terms of the Land Reform (Labour Tenants) Act 3 of 1996 (LRLTA). The Mdakane family's presence on the farm was common cause. However, the Maduna family's presence on the farm was disputed.

[3] The appellant, on the other hand, counter-claimed for the second respondent's eviction from a homestead on the farm. It

was the appellant's case that the second respondent was not an 'occupier' in terms of ESTA. Even though the second

respondent did not seek an alternative order to be declared an 'occupier' in terms of ESTA, and in fact denied that he was one, the Land Claims Court declared that he was an 'occupier' and further added that he may only be evicted in terms of ESTA.

- [4] After a trial lasting some 12 days the Land Claims Court declared, inter alia, that the first and second respondents are not labour tenants in terms of the LTLRA. The orders relating to the first respondent are not relevant to this appeal and I will not deliberate on them. The appellant's appeal concerns only the orders made on the counter-claim in respect of the second respondent.
- [5] I intend to only deal with the evidence that is relevant to determine the issues in this appeal. The history of the second respondent and his family's presence on the farm can be summarised as follows. Sometime in 1989, the second respondent, who was six years old at the time, arrived on the farm with his family. His late father was employed by Mr Mills, one of the erstwhile owners of the farm. His late father's duties included taking care of Mr Mills' goats and sheep. The conditions under which his father worked was disputed. It is not necessary to determine this dispute for the purposes of this appeal. During school holidays the second respondent also worked for Mr Mills.
- [6] In 2006, Mr Mills sold the farm to Weenen Safari CC. After the farm was sold, the families of the first and second respondents were the only ones that remained on the farm. The second respondent's father died in 2011. In 2003, after the second respondent
- matriculated, he started working on the farm.
- [7] The history of the second respondent's presence on the farm is uncontroverted. At the time of giving evidence, the second respondent was unemployed. He testified that in 2007, he left for Johannesburg where he found employment. He lived in Johannesburg because it would have been impossible to travel daily to and from the farm to which he returned intermittently. According to the second respondent, he returned during the December holidays. In 2011, he returned to the farm to nurse his sick father who did not survive. He left the farm sometime in 2012 after burying his father. Thereafter he was only on the farm for the Easter holidays in 2014, and a few days before he gave evidence in the Land Claims Court, which was from 4 October until 5 October 2016.[1]
- [8] Despite this evidence, the Land Claims Court declared that the second respondent is an 'occupier' in terms of ESTA and could only be evicted under the provisions of ESTA.[2] These orders were granted on the basis of the appellant's counter-claim.

Is the second respondent an 'occupier' in terms of ESTA?

- [9] The definition of 'occupier' in ESTA means 'a person "residing" on land which belongs to another

person, and who has or on February 1997 or thereafter had consent or another right in law to do so. . .'.[3] The Land Claims Court, relying on its recent judgment in *Mathebula v Harry*, [4] inter alia, found that the respondent's evidence was 'such as to evince the notion of continuing physical presence, which was only interrupted by economic factors, and has displayed an intention to return on a permanent basis.' [5]

[10] In Mathebula, the Land Claims Court accepted the definition ascribed to the meaning of the word ‘reside’ that was applied in the Supreme Court of Appeal in Kiepersol Poultry Farm Pty Ltd v Phasiya.[6] Explaining the definition of the word ‘reside’ in Mathebula:

[21] The meaning of “reside” as used in s 6(2)(dA) should not depend on mathematical formulas, such as how many days in a week a person spends on a particular farm. Nor should it depend on the subjective views of the owner of the land or the occupier. In determining whether a person is resident, there should at least be a degree of actual physical presence. But this need not necessarily be continuous. Importantly, the Court should accept that actual physical presence may be interrupted by economic factors, such as employment. Where this is the case, there must at least be an intention – exhibited by conduct – to return on a permanent basis to one’s residence. It is wrong to assume, in all instances, that simply because one lives elsewhere out of economic necessity, that fact should ipso facto exclude their residence on a particular farm.’

[22] The enquiry therefore must be directed at establishing one’s permanent home: this should take into account the history, the overall objects of ESTA, and the actual physical location of the occupier at the time of this death. In relation to the objects of ESTA, an important consideration is that an occupier has a real right to be buried on a property which belongs to another person arising from one’s status as a former employee and resident on the farm. This must always be taken into account when deciding whether the residency requirement is met.’[7]

[11] In Mathebula, the applicants sought an order in terms of s 6(2)(dA) of ESTA to bury the brother of one of the applicant’s, Ms Mathebula, on the farm, Sweet Home. The Land Claims Court found that Ms Mathebula lived on the farm and her late brother also lived on the same farm on weekends and at his workplace during the week. For these reasons the Land Claims Court held that the deceased ‘resided’ on the farm.

[12] Given South Africa’s socio economic realities, as well as the purpose and objects of ESTA,[8] the meaning given to the word ‘reside’, in my view was correctly adopted by the Land Claims Court in Mathebula. The facts in Mathebula are clearly distinguishable from the facts in this case. There is no doubt that the respondent regarded the Maduna homestead as his ancestral home where family rituals were conducted. Both his parents are buried on the farm. But the ‘degree of actual physical presence’ required in terms of the Mathebula judgment, on the respondent’s evidence, was not sufficient to establish ‘an intention exhibited by conduct – to return on a permanent basis.’ The second respondent’s lengthy absence from the Easter holidays in 2014 until a few days before his testimony, sometime in late September or October 2016 is inexplicable. On this basis the second respondent could not have ‘resided’ on the farm in terms of the definition of ‘occupier under the provisions of ESTA.

[13] I am accordingly satisfied that on the second respondent’s evidence before the Land Claims Court, the respondent was not an ‘occupier’ in terms of ESTA. This, however, is not the end of the matter.

If the second respondent is not an occupier, can he be evicted?

[14] It does not necessarily follow, as the appellant seems to suggest, that if the respondent is not an 'occupier', an eviction order should be granted. That depends on whether the applicable legislation was complied with. But the difficulty is that the appellant is not aware of the second respondent's present whereabouts, and if he is present on the farm, what his circumstances are. For these reasons the matter should be referred to the Land Claims Court to determine whether it would be just and equitable for an eviction order to be granted, if the appellant is advised to pursue such order.

[15] The second respondent was not legally represented in this appeal. This court appointed an amicus curiae to assist the court. We are grateful for his helpful heads of argument and submissions. No order as to costs was sought.

[16] I make the following order:

Z Carelse

Acting Judge of Appeal

APPEARANCES:

For Appellant: A A Gabriel SC

Instructed by:

Calitz Crockart & Associates, Kloof

Stander & Green Attorneys, Bloemfontein

For Respondent: Amicus, H E de la Rey

[1] 'You say that at the moment you are unemployed --Yes . . . When did you come back -- I am a week now back . . . Did you ever come back home after you had left for Johannesburg. --Yes, I would arrive in December . . . When your father passed on, were you already in Johannesburg? -- I had come back for three months I was looking after him whilst he was sick. I was here for three months looking after him whilst he was sick When was that when you came back? -- It was 2011 though I might not recall precisely, but is because my dad died in 2011. And did you go back to Johannesburg after 2011 -- No, I left in 2012 because I had still to do some chores. After you left in 2012, did you ever come back again -- Yes I would be back in December. I had been at home in 2014. When about in 2014? It was in the Good Friday holidays. . .' (my emphasis)

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. . .

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Did you ever come back home after you had left for Johannesburg. --Yes, I would arrive in December

When your father passed on, were you already in Johannesburg? -- I had come back for three months I was looking after him whilst he was sick. I was here for three months looking after him whilst he was sick

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After you left in 2012, did you ever come back again -- Yes I would be back in December. I had been at home in 2014.

When about in 2014? It was in the Good Friday holidays. . .' (my emphasis)

- [2] The order of the Land Claims Court para 85 provides: '(1) The action brought by the first and second plaintiffs is dismissed.
- (2) The counterclaim brought by the first defendant is dismissed.
- (3) It is declared that Mrs Mdakane may be relocated on the first defendant's land, subject to the following conditions:
- (a) Mrs Mdakane retains the right to keep 3 cattle and 57 goats, and to have sufficient grazing rights for that number of livestock;
- (b) Mrs Mdakane must be provided with sufficient land for subsistence cropping; and
- (c) Mrs Mdakane must be permitted to visit, maintain and carry out rituals at her husband and mother in law's graves, subject to her giving the first defendant reasonable notice.
- (3) It is declared that Mr Sifiso Maduna is an occupier in terms of ESTA and may only be evicted in terms of ESTA.
- (4) There is no order as to costs.'

[2] The order of the Land Claims Court para 85 provides:

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- (2) The counterclaim brought by the first defendant is dismissed.
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- (a) Mrs Mdakane retains the right to keep 3 cattle and 57 goats, and to have sufficient grazing rights for that number of livestock;

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- (c) Mrs Mdakane must be permitted to visit, maintain and carry out rituals at her husband and mother in law's graves, subject to her giving the first defendant reasonable notice.
- (3) It is declared that Mr Sifiso Maduna is an occupier in terms of ESTA and may only be evicted in terms of ESTA.
- (4) There is no order as to costs.'
- [3] Section 1(1) of ESTA.
- [4] Mathebula v Harry 2016 (5) SA 534.
- [5]

Judgment

of the Land Claims Court para 80.

- [6] Kiepersol Poultry Farm Pty Ltd v Phasiya 2010
- (3) SA 152 (SCA); [2009] ZASCA 119 paras 8 – 9 where Mpati P held: '[8] In Ex parte Minister of Native Affairs this court was concerned with the interpretation of the word 'resides' in s 10(3) of Act 38 of 1927. The court said: In construing the word "resides" one must bear in mind what was said by Solomon J in Buck v Parker (1908 TS at p 1104) where the learned Judge said: "The word 'residence' is one which is capable of bearing more than one meaning, and the construction to place upon it in a particular statute must depend upon the object and intention of the Act. As was said by Earle CJ in Naef v Mutter (CP p 359), "Residence has a variety of meanings according to the statute in which it is used." [6] . . .
- [9] In Mkwanazi v Bivane Bosbou (Pty) Ltd one of the issues the court was called upon to determine was the meaning of the term 'reside' in the definition of 'labour tenant' in the Land Reform (Labour Tenants) Act 3 of 1996. The court adopted the meaning ascribed to the word 'reside' [6] by Baker J in Barrie NO V Ferris viz: "[R]eside" means that a person has his home at the place mentioned. It is his place of abode, the place where he sleeps after the work of the day is done It does not include one's weekend cottage unless one is residing there The essence of the word is the notion of "permanent home".'

[6] Kiepersol Poultry Farm Pty Ltd v Phasiya 2010

(3) SA 152 (SCA); [2009] ZASCA 119

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'[8] In Ex parte Minister of Native Affairs this court was concerned with the interpretation of the word 'resides' in s 10(3) of Act 38 of 1927. The court said:

In construing the word “resides” one must bear in mind what was said by Solomon J in *Buck v Parker* (1908 TS at p 1104) where the learned Judge said:

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[9] In *Mkwanazi v Bivane Bosbou (Pty) Ltd* one of the issues the court was called upon to determine was the meaning of the term ‘reside’ in the definition of ‘labour tenant’ in the Land Reform (Labour Tenants) Act 3 of 1996. The court adopted the meaning ascribed to the word ‘reside’[6] by Baker J in *Barrie NO V Ferris* viz:

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[7] Mathebula fn 4 para 21 - 22.

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