

SOUTH AFRICA / JUDGMENT

Daniels v Scribante and Another (LCC164/2015) [2015] ZALCC 12 (11 November 2015) [2015] ZALCC 12

COURT

Land Claims Court

BEFORE

Y S Meer, M Pshe

CASE / FILE NUMBER

LCC164/2015

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

AT CAPE TOWN

Case

No.: LCC164/2015

DATE:

11 NOVEMBER 2016

In

the matter between:

YOLANDA

DANIELS.....Appellant

And

THEO

SCRIBANTE.....First

Respondent

CHARDONNE

PROPERTIES

CC.....Second

Respondent

JUDGMENT**MEERAJP**

Heard on 6 November 2015

Introduction

- [1] The Appellant appeals against a decision of the Stellenbosch Magistrates Court which found that she, as an occupier, did not have the right to effect improvements to the cottage she occupied on the farm Chardonne, Blaauklippen Road outside Stellenbosch, (“the farm”), without the owner's consent.
- [2] In June 2015, the Appellant as Applicant, initiated proceedings in the Stellenbosch Magistrates Court in terms of section 19(b)(ii) of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”), for an order framed inter alia as follows:

“

1. Declaring that the Applicant is entitled to improve her dwelling which is situated on the farm Chardonne, Blaauwklippen. Stellenbosch”.

The application was opposed by the First Respondent, the person in charge of the farm, and the Second Respondent, the owner of the farm. On 27 August 2015 the application was dismissed with costs on the basis that the Applicant's rights as occupier do not entitle her to do renovations and/or improvements to her home without the Respondents' consent. It is against this order that the Appellant now appeals.

Point In Limine

- [3] The Respondents raised as a point in limine, based on section 16 (2)(a)(i) of the Superior Courts Act 10 of 2013, that the decision sought will have no practical effect or result. The merits of the matter, they contended had become entirely academic, as the Appellant's right of occupation had been lawfully terminated in a letter of 17 September 2015, giving her notice to vacate the premises on 31 October 2015.
- [4] Mr Joubert, for the Respondents, submitted that the termination of residence as per the letter was just and equitable in terms of section 8 (1) (b) of ESTA, regard being had to the conduct of the parties. Mr Hathom, for the Appellant, countered that as the lawfulness of the termination is disputed, this is a matter that still has to be determined. I am inclined to agree. I note that eviction proceedings have not been instituted. If and when they are, the lawfulness or otherwise of the termination of the Appellant's residence will fall to be determined by the court hearing those proceedings. The letter of termination per se, cannot in the circumstances be said to constitute a lawful termination. I do not accept that the appeal has become academic and that this Court should decline to pronounce upon the merits for this reason.

- [5] Mr Hathom submitted also that the appeal raised an important point in law and should be heard for that reason also. Mr Joubert properly conceded that this Court has a discretion to hear the appeal in the broad interests of occupiers. They are correct. This appeal does raise a novel question pertaining to the rights of occupiers and should be heard for that reason too. The point in limine is accordingly dismissed.

Background

Facts

- [6] The Appellant is a domestic worker, who has lived on the farm since approximately 2000. Until recently, she lived there in one half of a small cottage with her three minor children. They shared a kitchen, had one bedroom and used an outside toilet. The Appellant moved out of her home on a temporary basis in June 2015 to effect improvements, expecting to move back two weeks later. However, she contends that the Respondents took advantage of her absence and deprived her of possession of her home by erecting a new entrance gate which is locked and blocks the door to her dwelling with a steel gate. This appeal was in the circumstances launched as a matter of urgency.
- [7] The Appellant came to occupy the dwelling through her former husband who was employed by the First Respondent. After he left she remained in the dwelling and her status as an occupier in terms of ESTA has never been in contest.
- [8] On 14 May 2015, the Appellant obtained an order from the Stellenbosch Magistrates Court declaring that she was an occupier and ordering the Respondents to repair and maintain the dwelling, and ensure the safety of the electricity supply thereto. The Respondents complied with the order and once the maintenance work was done, the Appellant contends that for the first time she was in a position to effect improvements to the dwelling.
- [9] On 10 June 2015 the Appellant's Attorney wrote to the Respondents and, according to her, in a letter aimed at conciliation, advised that she intended to improve the dwelling. The relevant parts of the letter state as follows:

"According to our instructions you have now finally attended to (a) maintain the roof (b) maintain the electricity supply and (c) ensured the safety of the electricity supply."

Our client is extremely grateful and wishes to record her gratitude. She perceives your conduct as not only displaying respect for the court, but also respecting her dignity and that of her family.

We trust that this could signal a fresh start for the parties and form the foundation for a healthy and co-operative future relationship."

However, to show her goodwill and trust in the improved future relationship, we also hereby notify you that our client intends to cause improvements to be made to her dwelling for her own account

These improvements include installing basic human amenities such as a window, water supply, wash basin, ceiling and to level the floors inside and pave some of the outside area.

Whilst these improvements are for her own account, the situation will change should you ever evict her, in which event you shall by law be liable to refund the costs of the improvements."

- [10] The Appellant's founding affidavit states that the aim of the improvements was to render the dwelling fit for human beings to live in. It states that she had no water supply, only one window and the ceiling was completely dilapidated.
- [11] A few days later, when she received no response from the Respondents, the Appellant went ahead with the improvements. It was only after a builder arrived on site and commenced building work, that the Respondents responded in a letter dated 17 June 2015. An answering affidavit by the First Respondent[1] records that since no time frame was stated in the Appellant's letter, he assumed building plans would have to be submitted and he did not immediately respond. He states that he would in any event have sought legal advice before responding to the letter, but that before he could do so, and within three working days of receipt of the letter, builders arrived unannounced and began construction work.
- [12] The letter called upon the Appellant to stop building immediately. It recorded the owner of the property had not given her permission to build, that neither plans nor quotes had been submitted for approval, and it raised the issue of compliance with the Health and Safety Act. It threatened an interdict and prosecution of the builders for trespassing, if building work did not stop.
- [13] A response from the Appellant's Attorney stated inter alia that the Respondents had been given an opportunity to object to the building but had not done so. The letter threatened legal action if the builders were refused access to the property. It was conceded that in principle plans were needed for the window and that if the Appellant was furnished with the original building plans, she would be willing to draw plans for the window. It stated that if the Respondents motivated objections were not received by 18 June 2015, the builders would continue the following day with the improvements.
- [14] Further correspondence ensued and despite an entreaty on behalf of the Appellant that she be allowed to proceed with the improvements as a matter of urgency to render her dwelling more suitable and amenable for human beings, permission continued to be refused.
- [15] The Appellant and her children, as aforementioned, had vacated the premises for the purposes of the improvements. At the time that the founding affidavit was deposed to on 29 June 2015, the Appellant was living with a friend sharing a room with two others. Her children who are in her care and custody were living with their father, some distance from their school. Their belongings had been stored elsewhere. The founding affidavit states that the Appellant and her children will endure substantial hardship if they are separated for a longer period of time.

[16] The Court a quo, after finding that the Respondents had not refused the Applicant the right to effect improvements, but expected her to act reasonably and consult with them first, found that ESTA did not entitle the Appellant to effect improvements without the Respondents' consent. The application was, for that reason, dismissed with costs.

Legal Context

[17] The rights of occupiers relevant to this appeal are those set out at sections 5, 6(1) and 6(2) of ESTA. Of relevance also, is section 13(1) which refers to improvements. It is useful to set out the sections at this juncture:

“5 Fundamental Rights

Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to-

- (a) human dignity;
- (b) freedom and security of the person;
- (c) privacy;
- (d) freedom of religion, belief and opinion and of expression;
- (e) freedom of association; and
- (f) freedom of movement,

with due regard to the objects of the Constitution and this Act.

6 Rights and duties of occupier.

- (1) Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.
- (2) Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right-
 - (a) to security of tenure;
 - (b) to receive bona fide visitors at reasonable times and for reasonable periods: Provided that-
 - (i) the owner or person in charge may impose reasonable conditions that are normally applicable to visitors entering such land in order to safeguard life or property or to prevent the undue disruption of work on the land; and

(il) the occupier shall be liable for any act, omission or conduct of any of his or her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage;

(c) to receive postal or other communication;

(d) to family life in accordance with the culture of that family: Provided that this rights shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997;

(dA) to bury a deceased member of his or family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists

[Para. (dA) inserted by s. 7 (a) of Act 51 of 2001.]

(e) not to be denied or deprived of access to water; and

(f) not to be denied or deprived of access to educational or health services.

13 Effect of order for eviction

(1) If a court makes an order for eviction in terms of this Act-

(a) the court shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors, including whether-

(i) the improvements were made or the crops planted with the consent of the owner or person in charge;

(ii) the improvements were necessary or useful to the occupier; and

(iii) a written agreement between the occupier and the owner or person in charge, entered into prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement;

(2) -.....

(3) No order for eviction made in terms of section 10 or 11 may be executed before the owner or person in charge has paid the compensation which is due in terms of subsection (1);
Provided that a court may grant leave for eviction subject to satisfactory guarantees for such payment".

[18] Mr Hathom, for the Appellant, correctly with reference to Dlamini and

Another v Joosten and Others 2006 (3) SA 342 (SCA), emphasised that the right of residence contained in section 6(1) creates a real right in land. Although the right to make improvements to a dwelling is not explicitly listed at section 6(2) as an incident of the right of residence, the

wording of section 13(1) which refers to improvements, he submitted is irreconcilable with the contention that an occupier is not entitled to make improvements to the land without the owner's consent. The owner's consent, he submitted, is relevant but, in terms of the section, only with regard to the amount of compensation payable for the improvements, not whether the occupier is entitled to make the improvements.

[19] In support of this argument he referred to the decision of the Constitutional Court in *Hattingh and Others v Juta* 2013(3) SA 275 (CC). In that case the Court stated at paragraph 38 that the purpose of the right to family life in section 6 (2) (d) was to protect the human dignity which occupiers had been denied under apartheid and to ensure that, despite living on other people's land, they would be able to live a life that is as close as possible to the kind of life that they would lead if they lived on their own land. So too in respect of the Appellant.

[20] Mr Hathom contended further that the conditions the Appellant had lived under, infringed her rights in terms of sections 5 (a) and

(b) of ESTA to human dignity and security of person and the right not to be denied access to water under section 6 (2) (d). They were entitled to install the basic human amenities necessary to render the building fit for human habitation. His contention, he submitted, is consistent with the purpose of sections 6(1) and 6 (2) of ESTA, being to try and ensure that occupiers, despite living on other peoples land, can live lives which approximate as closely as possible, the lives that they would lead if they lived on their own land. He however stated that Section 13 read with Section 6 does not give an abstract right to an occupier to effect improvements without consent.

[21] Mr Joubert, for the Respondents, submitted that a right to effect improvements without consent, for which the owner could then be held liable in terms of section 13, would constitute a significant inroad into the owner's common law property rights. ESTA must be deemed not to intrude upon such rights unless it is clear that such an intrusion is intended.

[22] With reference to the case *Serole and Another v Pienaar* 2000(1) SA 328 LCC, he drew an analogy between a right to bury a deceased family member and a right to effect improvements. In *Serole* this Court in effect found that an occupier did not have the right to bury a family member on an owner's farm. At 335 D - G the Court said the following:

such a right could constitute a significant inroad into the owner's common law property rights. A Court will not interpret a statute in a manner which will permit rights granted to a person under that statute to intrude upon the common law rights of another, unless it is clear that such intrusion was intended".

[23] Mr Joubert contended that the Appellant's reliance on section 13 was misplaced. The section does not alter the common law position to the extent of conferring a right to an occupier to effect improvements without consent, and certainly not in the face of a refusal of consent. Were such a right to exist, it would, he submitted impose a burden so onerous on an owner that the legislature could not have contemplated.

- [24] By way of example he referred to section 13 (3) of ESTA which states that no order for eviction may be executed before the owner or person in charge has paid the compensation due for structures erected and improvements made. That would mean, he submitted, that in the instant case the owner could have to pay R30 000.00 being the Appellant's estimated building costs, as compensation for improvements he had not consented to, in the case of an eviction. Such a drastic intrusion would clearly require an express, unambiguous, provision in the statute. I am inclined to agree. The rights which the legislature intended occupiers to have are expressly and unambiguously set out at sections 5 and 6 of ESTA, absent from which is the right contended for by the appellant. ESTA does not expressly or by implication grant such a right, and an entitlement to make improvements without consent cannot be construed from the mere fact that section 13 contemplates such a scenario could arise.
- [25] The interpretation called for by the Appellant with reference to section 13 (1), is furthermore, in my view, contrary to the clear intention expressed at section 6 (2) of ESTA that, "balanced with the rights of the owner", the occupier shall have the rights listed at section 6(2) (a) to (f). This makes clear that whatever rights occupiers have, are not unfettered but have to be balanced against those of the owner. Similarly at section 6 (1) it is clearly expressed that there is a right to have access to services "as had been agreed upon with the owner or person in charge whether expressly or tacitly". These are clear indications that ESTA simply does not entertain the exercising of rights unilaterally by an occupier without regard to the rights of an owner. This is in keeping with the statement in the preamble to ESTA that,
- ... the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners;"
- [26] In keeping with the tenor of ESTA, the Appellant was thus not entitled to effect improvements without consent. The circumstances under which she lived in cramped poorly ventilated conditions, certainly appeared to have been at odds with her right to dignity and called out for improvement, but not without consent. I note that given the nature of improvements she intended making, the persistent refusal of the Respondents to grant consent for the improvements was unfortunate and could in the circumstances even be viewed as unreasonable. For, whilst it is incumbent on occupiers, in keeping with the tenor of ESTA, not to effect improvements without consent, so too is it incumbent on owners not to unreasonably withhold such consent. Has the Appellant consulted with the Respondents and sought their consent she and her family might have been spared considerable hardship.
- [27] In view of my finding that the Appellant did not have the right to effect improvements without consent, the appeal cannot succeed. In keeping with the practice of this Court not to award costs except in exceptional circumstances[2], in matters such as these, being in the genre of social litigation, I intend making no cost order.

1 grant the following order:

1. The appeal is dismissed,
2. There is no order as to costs.

YSMEER

Acting Judge President

MPSHE Acting Judge

Appearances: Counsel for the Appellant: Mr P Hathom

Instructed by J D van der Merwe Attorneys,

Counsel for the Respondents:

Mr C Joubert

Instructed by Gerhard Gouws Attorneys.

[1] In response to the Appellants application for an urgent trial date.

[2] I have found there to be no exceptional circumstances in this matter warranting an award of costs, nor were any contended for

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