

SOUTH AFRICA / JUDGMENT

Goosen v Mtetwa (LCC27R/2010) [2010] ZALCC 22 (18 August 2010) [2010] ZALCC 22

COURT

Land Claims Court

BEFORE

MJALI

CASE / FILE NUMBER

LCC27R/2010

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

HELD IN

CHAMBERS

WEDNESDAY

18th

AUGUST 2010

Case

Number: LCC27R/2010

In the matter between:

JAN JACOBUS

GOOSEN Applicant

And

HEZEKIAH

PIKKANIEN MTETWA Respondent

JUDGMENT

MJALI AJ

INTRODUCTION

This is an automatic review in terms of section 19(3) of the Extension of Security of Tenure Act (“ESTA”)1 of an order granted by the Magistrate, Standerton, in an application for summary judgment on 6 May 2010, evicting the defendant from the property of the plaintiff. The magistrate’s order was couched in the following terms:

“ ‘n bevel tot uitsetting word verleen soos versoek in paragraaf 14(a-d) van die eiser se besonderhede van vordering onderhewig aan bekragtiging van hierdie verrigtinge deur die Gronddeesehof.”

The plaintiff is the registered owner of the property described in his particulars of claim as “Farm Honnibal number 351, situated in the district Standerton, Province of Mpumalanga” (“the farm”). The defendant and his family had been staying on the farm from the time he commenced working there. There appears to be a discrepancy as to the actual date of the commencement of his employment. According to the plaintiff the defendant started working and staying on the farm after February

1997. The probation officer’s report reflects that the defendant started residing on the farm Honnibal in 1994 with the commencement of his contract of his employment.

The plaintiff alleged, in his particulars of claim, that the defendant’s right of residence arose solely from his contract of employment with the plaintiff and that the right of residence of all other people (living with the defendant) arose as a result of their relationship with the defendant. He further alleged that the defendant’s right of residence on the property was terminated in terms of section 8(2) of the ESTA after he was convicted in a disciplinary enquiry that was held on 10 February

2009. In support of this contention the plaintiff annexed documents, marked annexures “JG2 and JG3” to its particulars of claim, which documents are said to be the record of the disciplinary enquiry and the notice of termination of the right of residence. The said documents must be read together with the probation officers report filed at the request of the magistrate. From these documents there appears to be irreconcilable disputes of facts with regard to the dates of the dismissal as well as the reasons for dismissal itself. The probation report states that the defendant was dismissed in 2007 as a result of the alleged

theft of welding equipment whereas the record of the disciplinary proceedings reveals that the defendant was convicted of unauthorised

absence from work and that it was recommended that he be dismissed summarily. These disputes of fact are in my view material and cannot be resolved on paper. It is further not clear what charges the defendant was facing at the disciplinary hearing. It therefore cannot be determined with what offence the defendant was charged and convicted.

The combined summonses were served on the defendant on 12 February 2010. The summons stipulated the times within which the defendant had to deliver his notice to defend as well as his plea as ten and twenty days respectively. On 22 February 2010 the defendant delivered his notice of intention to defend. As provided for in the summons he had twenty days within which to file his plea. This provision in the summons contemplates that the defendant has the stipulated number of days within which to take action and that the plaintiff cannot take a further step before the expiry of the dies induciae provided for in the summons. On 3 March 2010 six days after the delivery of the notice of intention to defend (and long before the lapse of the dies induciae), the plaintiff filed a notice of application for summary judgment.

Whilst it may be argued that the Rules of the high court are applicable in ESTA proceedings in the magistrates court and that in terms of Rule 32 (1) the plaintiff may apply for summary judgment where a defendant has delivered notice of intention to defend, it stands to reason that such application may only be granted where the court is satisfied that the defendant has no bona fide defence. The court can only conclude that the defendant has no bona fide defence where he has failed to file his plea within the stipulated time or where his plea does not disclose a defence.

The question of failure to deliver a plea does not arise in this matter as the *dies induciae* had not expired at the time the application for summary judgment was launched. It could not be said at that stage that the defendant had no bona fide defence to the plaintiff's claim. In my view the application for summary judgment prior to the expiry of the *dies induciae* was pre-mature and the assertion that the defence was mala fide and a delaying tactic was pure speculation. This is a point that was taken by the defendant in his affidavit opposing the granting of the summary judgment. No attention was paid to the issue of the premature application for summary judgment in the magistrate court.

What is more striking in this case is that at the hearing of the application for summary judgment no attention was given to the glaring discrepancies as to the date of commencement of the residency of the defendant on the farm as well as the dates of dismissal. Except for the recommendation of dismissal in the record of the disciplinary proceedings there is no clear proof that the defendant was in fact dismissed as a result of the disciplinary hearing held in February 2009. There is further no proof that such dismissal was ever communicated to him. It would appear from the magistrate's reasons for judgment that the probation officers report was disregarded completely for being one sided. No attempt whatsoever was made by the magistrate to invoke his inquisitorial powers in terms of section 31 of the Act to obtain the information that he deemed lacking in the probation report. He merely read the "summons as well as other documents filed of record" and after listening to arguments by both counsel he then granted summary judgment.

In his affidavit resisting summary judgment, the defendant took a point in limine that summary judgment cannot be granted in ESTA cases. This was dismissed by the court on the strength of existing precedents that summary judgment can be granted in eviction proceedings. Save for denying the allegations contained in the plaintiff's particulars of claim and putting him to the proof thereof, the defendant did not disclose his defence. Although the exception raised was dismissed by the court a quo the defendant pleaded for the hearing of the matter as the court was not fully exposed to all the relevant factors of the dispute to be able to adjudicate on this matter. Bearing in mind all the discrepancies highlighted above I am inclined to agree with the defendant's submission that the determination of whether or not to grant the eviction order sought in this matter required a value judgement which could properly be made only upon consideration of all the relevant facts and circumstances. These were not before the court a quo. Summary judgment is a drastic remedy granted only where the defendant has no bona fide defence. In *SA Bank of Athens Ltd v Van Zyl*

[2006] 1 All SA 118 (SCA) Erasmus AJA stated the following:

“It would be unfair and therefore improper to leave standing a summary judgment which was given without consideration of all the relevant facts and circumstances, where those facts were not placed before the court by the defendant due to its misunderstanding shared by the plaintiff and the court)”

In *Grootdraai Boerdery (Pty) Ltd v Dlamini* [2007] JOL 19429 (LCC) Bam JP dealing with summary judgment stated the following: “If it is reasonably possible that the plaintiff's application is defective or the defendant has a good defence, the remedy cannot be granted. In other words, the order is not given for the asking. The case made out for it in the plaintiff's verifying affidavit and in the cause of action must be as clear and compelling in every part as to justify the denial of a trial. It does not suffice for the plaintiff to merely allege that opposition is mala fide and playing for time and leave it at that.”

I respectfully agree with the views expressed above. In this matter not only were the relevant facts not placed before court but the magistrate also failed to take heed of the "just and equitable" requirements in terms of section 8 of the Act. In terms of that section, the right of residence may be terminated on any lawful ground provided such termination is just and equitable having regard 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 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."

In addition to his failure to pay attention to the factors mentioned above, the order granted by the magistrate did not comply with the relevant provisions of ESTA. The magistrate's order was couched in the following terms:

“’n bevel tot uitsetting word soos versoek in paragraaf 14(a-d) van die eiser se besonderhede van vordering onderhewig aan bekragtiging van hierdie verrgtinge deur die Grondeeisehoof.”

Such order failed to comply with the relevant provisions of ESTA in the following respects:

11.1. The magistrate ignored the glaring dispute pertaining to the date of occupancy of the defendant and simply accepted the plaintiff's word that the right of residence of the defendant commenced during or about 1999 without any legal basis. The Act demarcates between certain groups of occupiers i.e. those that were in occupation 4 February 1997 and those that commenced occupation after 4 February

1997. In other words the magistrate did not comply with section 9(2) (c).

11.2. The whole of section 12 has not been complied with completely in that the magistrate did not determine the dates to vacate the premises as well as that of execution in the event of the respondent's failure to vacate.

It is unclear whether section 13 applies. Due to this uncertainty the magistrate ought to have made an inquiry into the issues contained in that section before granting summary judgment.

For the reasons stated above it is my finding that summary judgment granted by the magistrate in Standerton ought to be set aside and I accordingly make the following order:

Order:

The order of the magistrate of Standerton for summary judgment granted for the eviction of the respondent on 11 January 2007 hereby set aside in its entirety and substituted with the following order:

summary judgment is refused;

leave is granted to the respondent to defend;

there shall be no order as to costs.

Wednesday 18 August 2010.

G N Z MJALI

ACTING JUDGE

LAND CLAIMS COURT, RANDBURG.

1 Act no 62 of 1997 as amended.

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