

SOUTH AFRICA / JUDGMENT

Kudus Kloof Trust v Teni and Others (LCC 61R/2008) [2010] ZALCC 18 (22 April 2010)

[2010] ZALCC 18

COURT

Land Claims Court

BEFORE

N Saba

CASE / FILE NUMBER

LCC 61R/2008

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NO:LCC 61R/2008

In Chambers

Decided on: 22 April 2010

In the matter between

KUDUS KLOOF TRUST APPLICANT

And

J TENI First Respondent

W TENI Second Respondent

K TENI Third Respondent

N TENI Fourth Respondent

E TENI Fifth Respondent

Z TENI Sixth Respondent

H TENI Seventh Respondent

N TENI Eighth Respondent

N MATYENI Ninth Respondent

M MATYENI Tenth Respondent

Y TENI Eleventh Respondent

JUDGEMENT

SABA AJ

- [1] This matter is before me on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act 62 of 1997, as amended (here after referred to as “ESTA”). An order for eviction was granted in case number 22/07 by the Magistrate, Komga on 6 March 2008 against the first to eleventh respondents. The respondents were not present when the eviction order was granted. They unsuccessfully applied for a rescission of the eviction order.
- [2] The applicant is Kudus Kloof Trust, a trust duly registered in accordance with the laws of the Republic of South Africa which is the registered owner of Kilarney Farm No 415, Komga Road, Eastern Cape. The 11 respondents reside on Killarney Farm No 415, Komga Road, Eastern Cape (“ herein-after referred to as the Farm”). Some of the respondents work on the farm in question, others work in surrounding areas. It is not clear from the papers which respondents work in the applicant’s farm and which ones work on other farms.

FACTUAL

BACKGROUND

- [3] The applicant bought the farm on 3rd August 2006, but before it was registered, Mr Trollip on behalf of the Trust, advised the Respondents of the Trust’s intentions

of developing the farm into a game farm, further that he wished to relocate them to another portion of the farm where they would not be within the game fenced area. Further proposals were made in order to assist the respondents with regard to alternative accommodation.

These proposals are in paragraph 15.7 of the Applicant’s founding affidavit. The Respondents refused to be removed from the piece of land citing the following reasons:

3.1 the piece of land was used for cultivation purposes, so it might be wet

during rainy season,

3.1 It is presently used for grazing purposes for their livestock

3.2 they have been staying there for a long time and can therefore not be relocated just like that;

3.4 they like the land they are occupying, therefore the farmer can just fence the land and leave the piece of land they occupy. 1

- [4] On 29 February 2010 the following queries were forwarded to the Magistrate:

- (i) The file still remains in a state which makes it difficult to peruse the record
- (ii) the record has not been typed as requested
- (iii) the magistrate's reasons do not appear from the record
- (iv) the probation officers report does not appear on the file however it is referred to in an affidavit filed. It is not clear when the report was requested and when it was filed or not and whether the magistrate had regard to section 9(3) of "ESTA" before granting the eviction order.
- (v) Acting Judge Ncube requested that the matter be referred for review after the rescission application was finalized. The reason for refusal of the application do not appear from the record. The magistrate's
- reasons**
- are required herein.
- (vi) With regard to the merit of the application, it is not clear when the occupiers came to reside on the farm and whether they are long term occupiers as provided for in section 8(4) or not.
- (vii) It is not clear when the applicant terminated the right of residence from the papers and what the magistrate relied on to find that there had been termination of the right of residence.
- (viii) Has the magistrate applied section 10 or 11 of "ESTA"
- (x) Which of the two occupiers earn in excess of R5000. What is the position with regard to the remainder of the occupiers who do not earn in excess of R5000.

[5] The magistrate responded as follows:

"Add 5 - No reasonable explanation was advanced for the defendant's absence during application. No evidence placed before court advanced any good course for rescission for judgement.

Add 6,7,8,9 – The applicant offers respondents better accommodation than They presently have as confirmed by the probation officer. Their refusal to

accept such relocation constitutes breach as set out in section 10 sub section

(1) (c) of the Act. Having regard to the fact that the Court found a breach as reinvestigate(sic) in section 10 (1) (c) the court is testified (sic) that provision is made in the application for the eviction of long term occupiers the court dealt with each occupier on the bases as if they were long term occupiers.

The record is returned herewith for review.

REQUIREMENTS FOR AN EVICTION ORDER

[6] Section 9 (2) of the Act reads:

“ A court may make an order for the eviction of an occupier if-

the occupier’s right of residence has been terminated in terms of section 8;

the occupier has not vacated the land within the period of notice given by the owner or person in charge

(c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and

(d) the owner or the person in charge has, after the termination of the right of residence, given-

the occupier; the municipality in whose area of jurisdiction the land in question is situated; and the head of the relevant provincial office of the Department of Land Affairs, for information purpose,

not less than two calendar months’ written notice of intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based:

Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date

of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.

- [7] For an eviction order to be granted there must be compliance with all the peremptory requirements mentioned above. The applicant must prove allegations made on the paper.

NON- COMPLIANCE WITH SECTION 9(2)(a)

- [8] Upon perusing the papers it is not clear that the respondents' rights of residence were terminated. There is no evidence of any agreement regarding the termination of occupiers rights of residence or notification thereof.

NON- COMPLIANCE WITH SECTION 9(2)(b)

- [9] There is no evidence on record indicating that a notice was given to the respondents to vacate the premises on a particular day. Consequently I find that there was no compliance with this section.

NON COMPLIANCE WITH SECTION 9(2)(c)

- [10] The papers do not indicate whether the respondents were occupiers before or after 4 February 1997. The magistrate did not explain whether section 10 or 11 is applicable and what factors the magistrate relied on when he replied that he dealt with each of the occupiers as long term occupiers. The Probation officer's report referred to in section 9(3) does not assist in this regard. It does not indicate how the eviction will affect the parties concerned, or whether there would be any undue hardship which an eviction would cause to the respondents2.
- [11] It is so that the applicant offered alternative accommodation to the respondents. That should not be the only deciding factor here. All the other requirements still have to be complied with before an eviction order can be granted.
- [12] The Magistrate indicated that the refusal by the respondents to accept relocation constitutes a breach set out in section 10(1)(c) of the Act3. It is not clear how the refusal to relocate constitutes a breach of a relationship and what the magistrate based this finding on.
- [13] The probation officer, without indicating what caused her to be satisfied that the alternative accommodation offered by the owner was better than the one they had, recommended that respondents should move to the alternative accommodation. This recommendation was made despite the fact that the respondents raised a concern about the condition of the alternative accommodation during rainy season.

It appears from the record that the magistrate did not have regard to all the relevant factors as required in terms of section 9(2) of ESTA. He evicted the respondents on the fact that they refused to relocate. I hold the view that both the probation officer and the magistrate did not balance the interests of the applicant and the respondents. It appears that the applicants' interests enjoyed preference. As such, I am of view that the occupier's right to security of tenure

as defined in section 6(2)(a) ESTA,⁴ as well as the intention of the Legislature as reflected in the Preamble⁵, were not given adequate consideration.

[14] Having regard to all the facts mentioned above, I am unable to confirm the order for eviction.

[15] The following order is made:

(1) The order of the magistrate in case number 22/07, Komga is set aside in its entirety

Acting Judge N Saba

Land Claims Court

Appearances:

For the applicant:

Drake Flemmer & Orsmond

King Williams' Town

For the respondent:

Ross GM Sogoni & Co.

East London

1 Paragraph 5 of the probation officer's report dated 19 November 2007

2 Paragraph 6 of the Probation Officer's report

3 Section 10(1)(c) of the Act("ESTA" states: "An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if- the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.

3 Section 10(1)(c) of the Act("ESTA" states:

"An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if- the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.

4 S6(2)(a) – 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 – to security of tenure

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5 AND WHEREAS it is desirable – That the law should promote the achievement of long- term security of tenure for occupiers of land, where possible through the joint effort of occupiers, land owners, and government bodies; That the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners; That the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognizing the right of land owners to apply to court for an eviction order in appropriate circumstances; To ensure that occupiers are not further prejudiced;

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Prepared on 12 October 2026 · Esheria