

SOUTH AFRICA / JUDGMENT

Lynn v Nene and Others (LCC95/2016) [2018] ZALCC 21 (29 January 2018)

[2018] ZALCC 21

COURT

Land Claims Court

BEFORE

Canca

CASE / FILE NUMBER

LCC95/2016

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT DURBAN

Not reportable

Of interest to other judges

Revised.

29/01/2018

CASE NO: LCC 95/2016

Before the Honourable Acting Judge Canca

In the matter between:-

IAN LYNN Plaintiff

and

JABULANI NENE First Defendant

GLADYS NENE Second Defendant

NHLANHLA NENE Third Defendant

DIRECTOR GENERAL OF THE DEPARTMENT

OF RURAL DEVELOPMENT AND LAND REFORM Fourth Defendant

THE MPOFANA LOCAL MUNICIPALITY Fifth

Defendant

Handed down on: 29 January 2018

JUDGMENT

CANCA AJ

Introduction

[1] The plaintiff, Ian Lynn, seeks the eviction of the first three defendants from the farm, Grasmere, which he co-owns with his wife, Kerry Lynn ("Kerry"). The eviction is sought in terms of section 10(1)(c) of the Extension of Security of Tenure Act 67 of 1997 ("ESTA") and, in the alternative, section 7(2)(b) of the Land Reform (Labour Tenants) Act, 3 of 1996 ("The Labour Tenants Act"), in the event that they are found to be labour tenants. The aforementioned sections empower the court to order the eviction of an occupier or a labour tenant who, by his or her conduct, has committed such a material breach of the relationship between the occupier or labour tenant, on the one hand, and the owner or lessee, on the other hand, that it is not practically possible to remedy the relationship.

[2] The first to third defendants, Jabulani Nene ("Nene"), his wife, Gladys Nene ("Gladys") and their son, Nhlanhla Nene ("Nhlanhla"), oppose their eviction. They deny having committed any of the aberrant conduct complained of and contend that the alleged break down in their relationship with the Lynns was engineered by the Lynns, who, in the light of a term in the sale agreement for Grasmere that,

"the purchaser acknowledges [the] dispute with the illegal tenant, and takes responsibility for the situation, with no recourse to the seller.",

created the conditions for their eviction. Nene, Gladys and Nhlanhla have filed a counter claim in which Nene and Gladys seek to be declared labour tenants. Nhlanhla, on the other hand, seeks to be declared an associate[1]. In addition to the aforesaid relief, Nene also prays for an order awarding him the land he and his family are currently occupying on Grasmere.

[3] In addition to Nhlanhla, Nene and Gladys have two more adult children, as well as three grandchildren, living with them on Grasmere. Together, they are hereinafter referred to as "the Nene family". The fourth defendant, the Director- General of the Department of Rural Development and Land Affairs ("the Director- General"), is cited in his official capacity as the functionary in charge of the department. The fifth defendant, Mpofana Local Municipality ("the Municipality"), is the municipality in whose jurisdiction Grasmere is located. The Director-General and the Municipality have not indicated their stance to this action and were not represented at the hearing of the matter.

[4] In order to succeed in an action for an eviction order under both ESTA and the Labour Tenants Act, the party seeking the eviction must comply with certain procedural requirements.

[5] A court may make an order for the eviction of an occupier if certain mandatory procedural requirements have been met. Section 9(2)(d) of ESTA provides that the order may be granted if,

"the owner or person in charge has¹ after the termination of the right of residence¹ given –

(i) The occupier;

(ii) The municipality in whose area of jurisdiction the land in question is situated; and

(iii) The head of the relevant provincial office of the Department of Rural Development and Land Reform¹ for information purposes,

Not less than two calendar months' written notice of the intention to obtain an order for eviction 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 has¹ after the termination of the right of residence¹ been given to the occupier¹ the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform 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."

[6] The court is also obliged, in terms of the provisions of section 9(3) of ESTA, to request a probation officer's report contemplated in section 1 of the Probation Services Act, 1991. This report generally

(a) comments on the availability of suitable accommodation to the occupier, (b) indicates how the eviction will affect the constitutional rights of the affected person, including the rights of the children to education and (c) points out any undue hardships which the eviction will cause the occupier, as well as any other relevant matter.

[7] Where the owner intends to evict a labour tenant, he or she must, in terms of the provisions of section 11 of the Labour Tenants Act give the labour tenant and the Director-General not less than two calendar months' written notice of his or her intention to obtain an order for eviction. The notice must, inter alia, contain the grounds on which the intended eviction is based. Finally, the Director-General is obliged to convene a meeting between the labour tenant and the owner in order to mediate a settlement of the dispute between the parties.

Background facts

[8] Prior to their residence on Grasmere, Nene and Gladys lived with his mother, Ester Hadebe and his step-father, on a timber farm, Mooibank, in Rosetta, whom they joined during 1990. Ester Hadebe and her husband worked on Mooibank for the farmer, Anthony Frances ("Frances"), she as a domestic helper and he as a labourer. According to Nene, he and Gladys were also taken into Frances' employ, he as a general labourer and she as a domestic helper. After a few years living at Mooibank, Nene, Gladys and his children moved to Grasmere with Frances, where he now farmed with dairy cattle. They continued working for Frances on Grasmere. According to both Nene and Gladys, the terms of their employment at Grasmere

were the same as at Mooibank.

[9] Frances, who testified for the plaintiff, denied that he had employed Gladys at either of the two farms. He also disputed Nene's version of

(a) the conditions under which he was employed and (b) when the relocation to Grasmere occurred.

[10] The dispute as to the conditions of employment is the following. Nene states that he and Gladys, like his mother, Ester, were employed as labour tenants. According to both testimonies, their remuneration consisted of a small monthly stipend and, although neither could recall the exact amount, both stated that the monetary sum constituted a small portion of their monthly remuneration. In addition to the stipend, they received monthly food rations consisting of an 80kg bag of maize meal, a 10-kg bag of sugar, a box of tea, 2 kg coffee, 5 litre cooking oil, 5 kg beans and meat as well as a daily ration of 5 litres of milk. Frances, who allegedly also paid their children's school fees, and occasionally their school books, also permitted them to grow crops and to graze livestock,

including approximately 5 cattle and a number of goats, so their testimony continued. Frances denied that he had employed Nene as labour tenant or that he was allowed grazing rights.

According to him, Nene was employed as a farm worker and was paid a salary

commensurate with the wages paid to other farm workers in the area. He was, however, unable to recall the amount but acknowledged that some of his employees requested maize as a portion of their wages.

[11] The dispute as to when the parties relocated to Grasmere according to Frances is that this occurred during 1998 whereas Nene, Gladys and Nhlanhla testified that the relocation happened during 1995. Their testimonies on this aspect ranged from the relocation having occurred during (a) March 1995, (b) the winter months of 1995 and (c) during a school holiday in 1995, respectively. Frances was unable to recall when in 1998 the relocation took place.

[12] Counsel expanded a lot of energy on this aspect of the matter. As I understood their various submissions, this exercise was driven, in part, by the provisions of section 3(1) of the Labour Tenants Act which state:

"Notwithstanding the provisions of any other law, but subject to the provisions of subsection (2), a person who was a labour tenant on 2 June, 1995 shall have the right with his or her family members-

(a) To occupy and use that part of the farm in question which he or she or his or her associate was using and occupying on that date; (b) To occupy and use that part of the farm in question the right to occupation and use of which is restored to him or her in terms of this Act or any other law."

By contending that the Nene family was not residing on Grasmere during June 1995, it was argued, on behalf of the plaintiff, that Nene, Gladys and Nhlanhla did not qualify for the rights they sought in their counter claim. That argument was strenuously opposed. However, given the decision I have reached, I do not consider it necessary to make a finding on which version is plausible.

[13] At some point, Frances sub-divided Grasmere into various small holdings. Thereafter, he sold these stands, retaining only the

portion on which his residence and the Nene homestead were situated. The remaining portion of Grasmere, now only measuring 22,075

hectares, was eventually sold in 2002 to Francois Castelyn ("Castelyn"), when Frances retired from farming.

[14] Castelyn concluded a comprehensive employment contract with Nene on 12 August 2002 which covered aspects such as his duties, the policies and rules which applied to employees, his remuneration (and the manner in which it would be paid), leave, working hours, a termination clause and an accommodation policy consisting of 3 pages. His rights of residence on Grasmere are clearly spelt out as being dependent upon him being employed as an employee. There was evidence that the document, which is drafted in English, was translated for Nene's benefit.

[15] Notwithstanding evidence to the contrary contained in the aforesaid contract, Nene testified that the conditions of his employment with Frances remained the same under Castelyn, who did not testify during the trial. The farm was eventually sold to Brian Nicholettes

("Nicholettes") in 2008, who prohibited Nene from keeping cattle, so his testimony continued.

[16] Nene was dismissed for breach of his employment contract approximately a year after working for Nicholettes. He challenged the dismissal but, following the intervention of the Commission for Conciliation, Mediation and Arbitration ("CCMA"), settled the dispute without obtaining reinstatement or re-employment. He accepted payment of the sum of R2000.00 and therefore remained dismissed. However, despite his right of residence on Grasmere having now terminated, the Nene family continue living on the property.

[17] Nicholettes sold Grasmere to the plaintiff and his wife, Kerry Lynn ("the Lynns") who took possession of the property in April

2014. Despite protestations to the contrary from the defendants, it is readily apparent from the evidence, which I deal with later in this judgment, that the relationship between the Nene family and the Lynns was strained from the outset and remains so. The upshot of this state of affairs was the institution of these proceedings by the plaintiff in April 2016.

Discussion

Are the defendants labour tenants?

[18] Before I consider the merits of the plaintiff's prayer for the eviction of the Nene family, it is convenient to first ascertain

whether Nene and Gladys qualify as labour tenants, and whether Nhlanhla is an associate. This is because, if they have made out a case, then it might affect the eviction application.

[19] Section 1 of the Labour Tenants Act defines a labour tenant as being a person:

"(a) who is residing or has the right to reside on a farm;

(b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such a right provided or provides labour to the owner or lessee; and

(c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,

including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker ..."

A farmworker, on the other hand, is defined as being

"a person who is employed on a farm in terms of a contract of employment which provides that-

(a) in return for the labour which he or she provides to the owner or lessee of the farm, he or she shall be paid predominately in cash or in some other form of remuneration, and not predominately in the right to occupy and use the land;

(b) he or she is obliged to perform his or her services personally."

Has there been compliance with the requirements of paragraph (a)?

[20] The threshold requirements for qualification as a labour tenant, referred to above, are interpreted cumulatively. Therefore, in order to succeed with their counter claim, Nene and Gladys have to satisfy the criteria set out in paragraphs (a),(b) and (c) of the definition of labour tenant. See *Selsley Farm Trust v Mhlongo* [2010] 1 All SA 466 (SCA) at par [10]. Given that Nene and Gladys still reside on Grasmere, they clearly satisfy the requirements of (a) of the definition.

Has there been compliance with the requirements of paragraph (b)?

[21] Frances' testimony refuting Nene's assertion that he was employed as a labour tenant on both Mooibank and Grasmere, was, to my mind, unsatisfactory in a number of respects. Firstly, his inability to recall the "salary which was commensurate with the wages paid to other farm workers in the area", whilst possibly due to his advanced age and the length of the period from when he retired from farming and the date of the trial, could have been easily cured. He or the plaintiff could have made enquiries or obtained the relevant information from the local farmers association from whence, according to his testimony, he

had obtained wage guidelines for his employees. Secondly, although not specifically denying the list of food rations received by Nene, he stated that some of the employees requested that part of their wage be paid in the form of a bag of maize. Although that might have been the case, his testimony was not sufficient to dispel the contention that the monthly wage was not paid predominately in cash. Gladys corroborated Nene's testimony regarding the monthly remuneration although it was not clear that the aforesaid remuneration is what they received jointly or whether she and Nene each received separate rations. However, I accept, for the purposes of this judgment, that the wage was paltry.

- [22] Thirdly, whilst the number of the Nene livestock on Mooibank might be open to speculation, I am of the view that it is probable that Nene was allowed to keep some cattle on Grasmere which was a dairy farm at the time. Both Frances and Nene proclaimed their relationship to be cordial (in fact, Nene, at some point during his testimony, stated that he and Frances were friends.). Nene's testimony that Frances, although this was denied, had given him a cow, rings true, given their admitted amicable relationship and the fact that Frances farmed with cattle. Nene stated that he only removed his three cattle from the farm when he was prevented from keeping same by a subsequent owner of Grasmere. I find this plausible. However, even if I am wrong in this regard, it is unlikely that he was not given cropping rights, when viewed against the evidence of his dispute over access to water for domestic and irrigation use with the Lynns and their complaint that he had ploughed virgin soil without their permission.
- [23] When weighing up the testimonies of Frances, on the one hand, and that of Nene and Gladys, on the other hand, their evidence on this aspect of the matter is preferred to that of Francis, which was vague. It is common cause that Nene is illiterate and, as a result, the delivery of his testimony was rather unsophisticated. And, at times, dogmatic. Gladys, who has some schooling, was a good witness and was unshaken during most of her cross-examination.
- [24] I am satisfied that Nene has proved the requirement of paragraph (b) of the definition of labour tenant. Although I accept Gladys' testimony that she provided domestic services to Frances at Mooibank and Grasmere, I am not persuaded, on the evidence, that these services were done in return for her acquiring an independent right to reside, crop and graze on these farms. It seems to me that Frances' relationship was with Nene rather than with Gladys, who might have been required to provide domestic services on Grasmere in fulfilment of Nene's right to reside, crop and graze there. I find that the evidence does not support the contention that Gladys has fulfilled the requirements of paragraph (b) of the labour tenant definition.

Has there been compliance with the requirements of paragraph (c)?

- [25] What remains then, is to ascertain whether the provisions of paragraph (c), which require residency and the use of cropping or grazing land, in return for the provision of labour by the parent or grandparent of an applicant for labour tenancy, have been satisfied.

- [26] Nene contends that he has complied with this requirement by virtue of his mother having been a labour tenant on Mooibank. It is common cause that Nene's mother, Ester Hadebe resided on Mooibank and provided labour to Frances. Two threshold requirements of paragraph
- (c) of the definition have therefore been met. However, what is unclear is whether she had an independent right to cropping or grazing or whether there were, in fact such rights, granted to her or her husband. The evidence on this aspect of the matter was surprisingly superficial. Part of Frances' testimony was that the workers did not have these rights on Mooibank as it was a timber farm with limited land for cropping and grazing. Whatever excess land there was, he used graze the few cattle he kept for his own domestic use. And, although Ester Hadebe worked for him, he could not recall the terms of her employment, so his testimony continued.
- [27] Nene, on the other hand, although he testified that his remuneration mirrored that of his mother, it is unclear from his evidence whether the remuneration allegedly given to his mother was actually hers or belonged to the household, given that she was living there with her husband, Nene's step-father. No evidence at all was led on the step-father except that he was also a labourer on Mooibank and that he was married to Ester Hadebe.
- [28] The defendants appear to have lost sight of the fact that the tenant's obligation to provide labour to a farmer need not necessarily be his or her own labour. It may be that of others. Little evidence was presented to press home that distinction.
- [29] Whilst it is possible that labour tenancy rights could have been bestowed on his step-father and Ester Hadebe, I am, in the absence of uncontroverted evidence of their cropping or grazing rights on Mooibank, unable to infer that Ester Hadebe, or her husband, for that matter, had any of the aforesaid rights. The testimony presented by Frances that his employees on Mooibank did not enjoy cropping or grazing rights outweighs the paltry evidence, given by Nene and Gladys in this regard.
- [30] I have taken note of the dictum of Van Heerden JA in *Brown v Mbense* [2008]

4 All SA SCA 26 at para [28], where the learned Judge states,

"It is simplistic to approach the relationship between a farm owner and a labour tenant as necessarily of which only one member of a household or family unit has the right to be or remain on the farm as a labour tenant. Complexities abound. For example, it might well be inferred that in appropriate cases that each member of a family unit consisting of a father, mother and child agreed with the farm owner that he or she be afforded labour tenancy rights in return for his or her providing labour individually and not necessarily in equal measure."

- [31] In my view, Mbense, supra, does not assist Nene. Nothing in the scant evidence presented by Nene and Gladys, on this aspect of their counter claim, persuades me that Nene's mother or step-father lived on Mooibank and provided labour in consideration for the use of cropping or grazing land. Also, they were unable to show that the agreement alluded to in the last paragraph of Van Heerden JA's dictum, referred to above, was secured by either Ester Hadebe or her husband.
- [32] In the light of the above, I find that Nene has failed to bring himself within the provisions of paragraph (c) of the definition of a labour tenant. The counter claim by Nene to be declared a labour tenant must, as a result, fail.
- [33] With regard to whether Gladys meets paragraph (c) of the definition, Mr Chithi, for the first three defendants, faced with the difficulty of proving that Gladys had a parent or grandparent, with labour tenancy rights, living at Mooibank, sought to persuade me during argument that "parent" in the definition of a labour tenant, includes "parent-in-law" and that Gladys, by virtue of that interpretation, met the requirements of paragraph (c).
- [34] I remain unpersuaded by this argument. Not only was Mr Chithi unable to support this novel argument with any authority but I am not convinced that the phrase "parent-in-law" is, in fact, grammatically sound. The Labour Tenants Act refers to "parent or grandparent". "Parent" according to the South African Pocket Oxford Dictionary (3rd ed.), means "father or mother". This definition, in my view, does not extend to a "parent-in-law". However, be that as it may, I am of the view that had the Legislature intended to include a parent by marriage in the definition of a labour tenant, it would have done so explicitly. In the light of the fact that there is no evidence that Gladys had a parent or grandparent on either Mooibank or Grasmere, the counter claim by Gladys falls to be dismissed.

Award of land

- [35] A labour tenant's right to acquire land or a right in land and the procedure he or she must follow for such an acquisition is set out in sections 16 and 17 of the Labour Tenants Act. The provisio to sections 16 (1) sets 31 March 2001 as the cut-off date by which the aforementioned application had to be lodged with the Director-General.[2]
- [36] It is common cause that Nene has not complied with the provisions of sections 16 and 17 of the Labour Tenants Act. Mr de Wet, for the plaintiff, citing the judgment of Meir AJP in *Normandien Farms (Pty) Ltd v Mathimbane & Others* (20-23 October 2015) LCC 196/2013 [5 November 2015] at paras [49] - [52], argued that, absent compliance with the provisions of section 16 and 17, this court could not grant the award sought by Nene. Proof that an application was made before the cut-off date had to be established and, Nene failed to do so, the argument continued.
- [37] Mr Chithi, without much conviction, argued that *Normandien Farms*, supra, was not authority for the contention that Nene was prevented from prevailing on this court to use its powers, in terms of section 33 (2A) of the Labour Tenants Act[3], to grant such an award.

[38] I see no merit in this argument. Section 33 (2A) clearly only empowers this court to determine labour tenancy irrespective of whether or not the applicant for such tenancy has applied to the Director General of the Department of Rural Development and Land Reform for acquisition of land. To assign a different interpretation to section 33 (2A) would be to misinterpret its provisions.

[39] In the circumstances, this portion of Nene's counter claim also falls to be dismissed.

Is Nhlanhla Nene an associate?

[40] No evidence was adduced that Nhlanhla Nene ever provided labour at Mooibank or Grasmere. I am therefore unable to find that he qualifies as an associate.

Is the plaintiff entitled to an eviction order?

[41] Section 9(2)(c) of ESTA provides that an eviction under ESTA may only be granted if the conditions set out in sections 10 or 11, as the case may be, have been complied with. It is not in dispute that the provisions of section 10 are applicable in this matter as Nene, Gladys and Nhlanhla were already occupiers on 4 February 1997.

[42] The plaintiff contends that the series of events, set out hereunder, fall squarely within the scope of section 10(1)(a)(b) and (c) of ESTA. These sub-sections set out the breaches of the relationship which irretrievably destroy a relationship between an owner or lessee and an occupier. Section 10(1) states:

"An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if -

- (a) The occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
- (b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice in writing to do so;
- (c) 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;"

[43] Some of the impugned conduct which the plaintiff alleges contributed to breaking down the relationship irretrievably, include:

43.1 instituting a false criminal charge against the plaintiff;

43.2 cutting fences on the property;

43.3 swearing at and threatening the plaintiff and his family;

- 43.4 ploughing virgin soil without permission;
- 43.5 threatening to assault the plaintiff's minor with a pipe;
- 43.6 hunting with dogs on the property without permission;
- 43.7 setting off fireworks in close proximity to the stables;
- 43.8 kicking the plaintiff's motorbike;
- 43.9 falsely claiming to be deprived of water;
- 43.10 wrongly causing the arrest of Kerry; and
- 43.11 failing to reprimand a grandchild for insulting Kerry.

[44] Nene, Gladys and Nhlanhla deny that they or the other members of their family committed any of the conduct complained of. And, as stated in para [2] above, lay the blame for the strained relationship squarely at the feet of the Lynns.

[45] The following facts are common cause between the parties:

- 45.1 Nene is illiterate;
- 45.2 the Nene family had been residing on Grasmere when the Lynns acquired the farm during 2014;
- 45.3 neither Nene, Gladys or Nhlanhla work or worked for the Lynns;
- 45.4 the Nene family was given due notice to vacate the premises;
- 45.5 the Lynns keep horses on the property; and
- 45.6 both families have instituted civil proceedings against members of the other family in the Mooi River Magistrate's Court.

[46] The evidence shows that Kerry attempted to persuade Nene to enter into a written agreement regulating the Nene family's stay on Grasmere, soon after her arrival on the farm. He refused to sign the agreement. After a number of meetings with members of the Nene family where she complained of some of their behaviour, she caused her attorney to send the Nene family a formal letter of complaint and a notice informing them that proceedings for their eviction were being initiated.

[47] It is convenient to deal with some of the incidents set forth in paragraph [43] above.

[48] The relationship between the two parties had deteriorated to the extent that they instituted civil proceedings against each other in the local Magistrate's Court, a major contributor to this state of affairs being a dispute over access to water. This ultimately resulted in Nene obtaining a Magistrate's Court order directing the plaintiff to supply him and his family with 7 500 litres of water per month. This order was allegedly breached and resulted in Kerry's arrest. The plaintiff and Kerry sought and obtained a protection order against Nene during

May 2017 and Nene obtained a similar order against them the following month.

- [49] The complaint about a child insulting an adult involved one of Nene's grandchildren exposing his buttocks to Kerry in the presence of his mother and Gladys. The rather unconvincing response to this allegation was that the grandchild was playing a local version of the "haka" with another grandchild, a game they had learnt at school.
- [50] In response to the accusation that they their fireworks were set off in close proximity to the stables, Nene testified that they only set off fire-crackers to celebrate the dawn of a new year and that they only used the ones which were not loud. Kerry conceded during cross examination that the fireworks were only set off during New Year's Eve and that this was done from the Nene homestead.
- [51] The issue of Nene ploughing virgin soil without the plaintiff's permission was probably due to his belief that he had acquired

tenancy rights to the farm. A belief which, according to his testimony, had its genesis in Frances allegedly telling him that the

portion of Grasmere on which his homestead was situated belonged to him.

- [52] The plaintiff failed to adduce evidence to prove that it was either Nene, Gladys or Nhlanhla who was responsible for cutting fences on the property. There was also insufficient evidence to prove that the plaintiff's son was threatened with a pipe. The photograph showing Gladys carrying an object in her left hand does not prove the alleged threat, particularly as the object is not held in a threatening fashion nor is there any evidence of the plaintiff's son in the vicinity.
- [53] There is also no evidence that any member of the Nene family kicked the plaintiff's motorbike, as neither the plaintiff nor his son testified. The same applies to the allegation that Nene or members of his family hunted on the farm without Kerry's or the plaintiff's permission. Kerry was unable to identify which member of the Nene family was responsible for the alleged breach.
- [54] Regarding the complaint about being sworn at by members of the Nene family, I find, given the evidence of the tension between these two families and, in particular, on the occasions when Kerry and her family took photographs of some of the alleged offensive conduct, that it is probable that uncomplimentary language was directed at the Lynns by members of the Nene family, who might have taken umbrage at being photographed.
- [55] In *Labuschagne CC and Another v Ntshwane* 2007 (5) SA 129 LCC at para [23] Barn JP, states, "It is not so much the veracity or otherwise of the allegations that matters nor is it the reasonableness or otherwise of the explanations or rationalisation. It is rather the manifestations of deep levels of mistrust and suspicions over along period of time that are undeniable. Indeed, even the prolonged tussle of these proceedings is testimony of a fractured relationship such as is envisioned in section 10(1){c} of the 'Security of Tenure Act'. The 'Act' was not intended to

promote the security of opportunistic occupiers at the expense and exploitation of the rights and legitimate interests of the land owners.”

These words find resonance here as the animosity between the Lynns, on the one hand, and certain members of the Nene family, on the other hand, is quite palpable.

[56] Nene's belief that he had acquired title over, not only the portion of Grasmere he is currently occupying, but also the entire farm, and that the Lynns had no right to impose rules for the peaceful co-existence of the two families on Grasmere, in my view, appears to be a major contributor to the current state of affairs. This belief also appears to have clouded his decision-making abilities.

[57] During the course of the hearing, it transpired that Nene scoffed at several offers by the plaintiff to settle this matter without resorting to litigation. These offers were apparently also repeated, and rejected, during the trial, when I adjourned the proceedings to enable the parties to attempt a settlement of the matter. These offers ranged from a cash pay-out to Nene of, initially, R80, 000.00 and ultimately, R300, 000.00, the final figure, according to the testimony of the plaintiff's attorney, being sufficient to purchase suitable accommodation for Nene and his family in the town of Mooi River. During his testimony, Nene stated that R300, 000.00 was insufficient and would not enable him to purchase a farm. I am satisfied, in the light of all of the above, that the plaintiff has proved the requirements of section 10 (1) (c) of ESTA.

Is it just and equitable to evict the Nene family?

[58] It was not disputed that the Nene family are occupiers in terms of the provisions of section 10 of ESTA, as opposed to those of section

11. This is because Nene and Gladys took up residence on Frances' former farm, Mooibank, before 4 February 1997.

[59] The plaintiff's attorney, Mr McCarthy's uncontested testimony was that there is alternative accommodation available in the nearby Mooi River. It is also worth noting that Nene has been legally represented prior to and during these proceedings. Therefore, he, *prima facie*, has had the benefit of legal advice throughout this action.

[60] One of Nene's adult sons is employed as a taxi driver in Mooi River and Nene as well as Nhlanhla earn a living as casual labourers.

Gladys is allegedly unemployed but, according to her testimony, has for a number of years worked as a domestic helper. No evidence was led that she would be unable to do similar work should she seek and obtain same.

[61] Although the Constitutional Court in *Daniels v Scribante* [2017] ZACC 13 held that ESTA, in certain circumstances, places a positive obligation on a landowner, Pretorius AJ, in *Baron and Others v Claytile (Pty) limited and Another* [2017] ZACC 24 at [35] states that "This does not mean that private landowners carry all or the same duties as the State to fulfil the obligations set out in the

Constitution."

[62] It is not disputed that the Nene family does not pay any rent nor do they provide any services for their accommodation on Grasmere. The plaintiff cannot be expected to continue accommodating the Nene family. In the light of the evidence that Ester and two of Nene's brothers still reside on Mooibank, the Nene family might, in the short to medium term, find accommodation with them, should they so wish.

[63] However, even if the Nene family was not inclined to seek accommodation with their aforementioned family members, particularly

in view of the fact that there is no evidence of their accommodation, it is now settled law that it is the State's duty to provide

emergency or suitable alternative accommodation to persons, such as Nene and his family, if there is a possibility that they will be left homeless on eviction. In casu, that duty falls on the Municipality.

[64] In view of all the circumstances set forth above, I am of the view that an eviction in these circumstances would be just and equitable.

[65] I am enjoined by the provisions of section 13(1) of ESTA to make certain ancillary orders if the circumstances so require. The circumstances of this case, on the evidence, do not require the court to make any ancillary orders. However, nothing prevents any party to approach the court, on the same papers, suitably amended, for an ancillary order should a party be of the opinion that an ancillary order ought to be made.

[66] In the result, I order as follows:

1. The counter claim by the first, second and third defendants is dismissed.
2. The first to third defendants, and all other persons residing in the Nene household, are ordered to vacate the farm commonly known as Grasmere, Giants Castle Road, Mooi River, KwaZulu-Natal on or before 30 July 2018.
3. In the event that the first to third defendants, and all other persons residing in the Nene household, fail to vacate the farm Grasmere, Giants Castle Road, Mooi River, then the Sheriff for the district, is authorised and directed to evict them on 31 July 2018 or as soon as is reasonably possible thereafter.
4. There is no order as to costs.

MP Canca

Acting Judge, Land Claims Court

Appearances:

For the Plaintiff: Advocate A. De Wet SC

Instructed by: McCarthy & Associates Attorney, Nottingham Road

For the first to Third Defendants: Advocate MM Chithi

Instructed by: Blose Phindela Inc Attorneys, Durban

- [1] An associate means a family member of a labour tenant, and any other person who has been nominated as the successor of such labour tenant or has been nominated to provide labour in his or her stead.
- [2] The proviso to section 16 (1) states: "Provided that the right to apply to be awarded such land, rights in land and servitude shall lapse if no application is lodged with the Director General in terms of section 17 on or before 31 March 2001."
- [3] Section 33 (2A) states "at the instance of any interested person, including a person who avers he or she is a labour tenant,
- irrespective as to whether or not such a person has lodged an application in terms of section 17, the court may determine whether a person is a labour tenant."

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