

SOUTH AFRICA / JUDGMENT

Snyman and Others v Sehemmo and Others (LCC 57R/2010) [2011] ZALCC 5 (24 February 2011)

[2011] ZALCC 5

COURT

Land Claims Court

BEFORE

C. E. Loots

CASE / FILE NUMBER

LCC 57R/2010

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: LCC 57R/2010

Magistrate's Court Case No 217/08

In the matter between

MANUS SNYMAN1st PLAINTIFF

PETRONELLA ELIZABETH VON MOLKTE N.O.2nd PLAINTIFF

JOHAN VON STRAUSS VON MOLKTE N.O.3rd PLAINTIFF

and

ABRAM SEHEMO1st DEFENDANT

CHRISJAN HOERING2nd DEFENDANT

ISRAEL RITA3rd DEFENDANT

WILLIAM MOLOGTSO4th DEFENDANT

GEORGE MOLOGETSO5th DEFENDANT

REVIEW JUDGMENT

- [1] This is a matter in which an eviction order was granted in terms of the Extension of Security of Tenure Act (ESTA)¹ in the Magistrate's Court for the district of Delareyville under case number 217/08. The matter comes before this court for automatic review in terms of s 19(3) of ESTA.
- [2] The first plaintiff is the previous owner of the farm 'Gelukshoop' (the farm) in the district of Delareyville.

The second and third plaintiffs are cited as the trustees of the Mimosa Trust IT No. 6852/02 (the trust), which purchased the farm

from the first plaintiff and took transfer thereof on 20 May 2008.

- [3] The defendants are occupiers of the farm in terms of ESTA. It is common cause that they have been residing on the farm since before 4th February 1997 and that section 10 of ESTA accordingly applies to the eviction proceedings. The persons who live with the defendants are family members who occupy by virtue of their association with the defendants.
- [4] The five defendants were employed by the first plaintiff until 2003, but were dismissed after participating in a strike. The first plaintiff terminated their right of residence on the farm after their dismissal from his employment. The first defendant referred his dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act (LRA).² His dismissal was confirmed by the CCMA. The first plaintiff then proceeded to serve written notice of termination of residence on all the defendants,³ but they still refused to leave the houses in which they live on the farm.
- [5] On 29th January 2008 notices in terms of section 9(2)(d)(i) of ESTA were served by the sheriff on the defendants at the instance of the first plaintiff. Notices were also served on the relevant municipality and the regional office of the Department of Land Affairs, as required by section 9(2)(d)(ii) and (iii) of ESTA. On 22nd July 2008 the combined summons in this matter, claiming the eviction of the defendants, was issued out of the Delareyville Magistrate's

Court.

- [6] The defendants gave notice of intention to oppose the action, whereupon the plaintiffs brought an application for summary judgment. This application was correctly refused by the magistrate. For the guidance of magistrates and practitioners, it is worth mentioning that summary judgment applications are generally not appropriate in ESTA actions.⁴
- [7] Following the summary judgment application, the defendants took exception to the plaintiffs' particulars of claim on the ground that the first defendant did not have locus standi to claim an eviction because he was no longer the owner of the farm at the time when the summons was issued. The magistrate dismissed the exception.⁵ The matter eventually came to trial on 9th February 2010.

[8] After hearing the evidence of the first and third plaintiffs and four of the five defendants, the magistrate made the following

findings:

1. That the defendants were employed by the first plaintiff when he was the owner of the farm.
2. That their employment was lawfully terminated in terms of the LRA.
3. That their right of residence was lawfully terminated in terms of section 8(2) of ESTA.
4. That they refused to vacate the land within the period of notice given by the owner.
5. That notice of the action had been properly given in terms of section 9(d) of ESTA.
6. That the defendants had committed such a fundamental breach of the relationship between them and the owner that it was not practically

possible to remedy it, either at all or in a manner which could reasonably restore the relationship.⁶

[9] These findings enabled the magistrate to grant an order for the eviction of the defendants, the requirements of section 9(2) of ESTA having been met.⁷ The eviction order, made on 29th March 2009, required the defendants to vacate the farm by 29th June 2009, but was suspended pending this review. The review record was received by this court only on 25th October 2010. I am concerned about the long period of time that it took send the matter on review and urge court managers to prioritize these matters.

[10] I accept all the magistrate's findings, except for that set out in paragraph 6 above. Having read the evidence, I am not satisfied that a fundamental breach of the relationship between the defendants and the plaintiffs has been established. My

reasons

follow.

[11] In terms of section 10(1)(c) an eviction order 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'

[12] In the original particulars of claim the plaintiffs did not rely on section 10(1)(c) at all. It was simply alleged that the termination of the defendants' right of residence in terms of section 8(2) of ESTA entitled the plaintiffs to an eviction order on account of section 10(1)(d).⁸ This was an incorrect conclusion of law, because section 10(1)(d) applies only where an occupier has voluntarily resigned in circumstances which do not amount to a constructive dismissal. After the magistrate dismissed the summary judgment application for this reason, paragraph 22 of the particulars of claim was amended to include reference to section 10(1)

(c) of ESTA. The amended paragraph reads as follows:

‘Verweerders is persone wat voor 1994 op die plaas in diens geneem is en is Artikel 10 van die Verblyfregwet van toepassing. Die grondslag waarop die Eisers die Agbare Hof nader vir ‘n uitsettingsbevel voldoen aan die vereistes van subartikel 10(1)(d)(i) en (ii) en 10(1)(c) van die Verblyfregwet en wel in die opsig dat:

1.1 Die Verweerders se verblyfreg op die plaas uitsluitlik uit ‘n diensooreenkoms gespruit het; en

1.2 Die Verweerders se optrede wat tot die beeindiging van hul diensooreenkoms gelei het nie neerkom het op ‘n bedanking wat op konstruktiewe ontslag ingevolge die Wet op Arbeidshoudinge neerkom nie;

1.3 Die Verweerders ontslaan is en die Verweerders se optrede wat tot hulle ontslag gelei het optrede was so ‘n wesenlike verbreking van die verhouding tussen hulle en die vormalige eienaar van die plaas was dat dit nie prakties moontlik is om dit, hetsy in die geheel of op ‘n wyse wat rederlikerwys die verhouding kan herstel, te herstel nie.’

[13] Paragraph 1.2, as quoted above in paragraph [12], is not relevant as there was no voluntary resignation. This is one of the important differences between sections 10 and 11 of ESTA. In terms of section 11 a former employee who has been lawfully dismissed and whose right of residence has been terminated in terms of s 8(2) can be evicted if the court is of the opinion that this is just and equitable. In terms of s 10, a person who became an occupier after 4th February 1997 cannot be evicted on these grounds alone.⁹

[14] Paragraph 1.3 of the amended paragraph 22 of the plaintiffs’ particulars of claim, as quoted in paragraph [12] above created the opportunity for the plaintiffs to introduce evidence relevant to this section of ESTA at the trial.

[16] The first plaintiff gave evidence that shortly before Christmas in 2003 all five of the defendants went on strike. A disciplinary

hearing was held and they were dismissed. Under cross-examination he said that after the strike his relationship with the defendants was not good. He also testified that during this time the defendants brought an application against him in the magistrate’s court for an order to restore their rights of access to use the farm roads and gather wood without interference.

[17] The third plaintiff gave evidence that after the trust became the owner of the farm considerable damage was done to the farm house, which he said was unoccupied after the first plaintiff moved off the farm. He assumed that this damage was caused by the defendants or their families because he once saw children climbing out of the broken windows and running away towards the houses occupied by the defendants. His son also caught one of the children damaging a zinc dam.

[18] In the ex tempore judgment given at the end of the trial the magistrate, according to the transcript of the proceedings, said the following with regard to the allegation that the occupiers had committed a fundamental breach (quoted verbatim from the transcript)

:

‘First of all there was the strike that was confirmed by the CCMA’ ... then ‘subsequently there was another court case where the first plaintiff was taken to court on supplying water, wood etcetera. That out of its own is clear to the court that there is a fundamental breach in the relationship between the defendants and the plaintiff. Which cannot be remedied. Furthermore there is evidence, evidence was led by the plaintiff of malicious damage to property. It is not clear who the persons is that is responsible for that damage to the property.

However there is evidence that is undisputed that as far as Mr Riet is concerned. That some of his children were found damaging some of the property on the farm. That specific instance was also reported to the police. Further taken into consideration the last appearance before the court. There was evidence led that even the recent or current owner of the farm does not feel safe as far as a dog of one of the defendants had been killed. Has been shot by the second plaintiff in this matter. It is then clear to the Court that if I take all these circumstances into consideration that there is indeed a fundamental breach. Not only between the first plaintiff and the defendants, but also between the current owner and the defendants. Then if the Court then take all these specific circumstances into consideration I am satisfied that the plaintiff action should proceed.’

[19] The magistrate supplemented the ex tempore judgment with written reasons. The following paragraph is relevant to the section 10(1)(c) issue (quoted verbatim):

‘Eisers getuig dat die onwettige staking en daaropvolgende afdanking die verhouding tussen die Eerste Eiser en die verweerders nadelig

beïnvloed het. Daar was aanvanklik probleme tussen Manus en die verweerders deurdat hulle paaie in die veld geloop het, drade pap gery het en bome afgekap het. Na Manus die plaas verlaat het is die plaas gevandaliseer en kon die nuwe eienaars nie die plaas ontwikkel en verbeter nie. Die nuwe eienaars benodig die huise vir sy werkers wat tans nie behuising op die plaas het nie. Daar is twee huise wat leeg staan, maar as gevolg van die beskadiging aan die eiendom op die plaas, wil die eienaar nie mense daar insit nie. Verweerders ontken nie dat daar probleme is tussen die partye nie, en die saak wat die verweerders in 2005 teen Manus aanhangig gemaak het staaf die feit dat die verhouding tussen die partye versuur het. Verweerders ontken ook nie dat daar skade aangerig is aan die huise en ander eiendom op die plaas nie, maar beweer dat hulle nie daarvoor verantwoordelik is nie. Die verweerders gee dan ook name deur naamlik ‘n man met die naam “Petro” en “Nantie” wat ook op die plaas gewoon het en wat moontlik verantwoordelik is vir die skade. Slegs die naam Petro word teenoor Manus genoem. Die voorval waarin die plaasdam beskadig is deur ‘n kind van die verweerder word gestaaf deur dokumentasie vanaf die SAPS. Vierde verweerder het geen kommentaar hieroor te lewer nie.’

[20] I cannot agree with the magistrate's findings or the conclusion that the defendants had committed such a fundamental

breach of the relationship between them and the owner that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.

[21] The magistrate clearly regarded the fact that the defendants had brought a court application against the first plaintiff as important evidence that they had fundamentally breached the relationship between them and him. This cannot be correct, because if it were then occupiers in the position of the defendants would effectively be barred from accessing the courts to enforce their rights in terms of ESTA. In *Mpedi and others v Swanevelder and others*¹⁰ it was held that an occupier who was party to laying against the owner theft charges which could not be substantiated had fundamentally breached the relationship between himself and the owner. The present case is different, because the occupiers were enforcing their rights in terms of ESTA and the application that they brought against the first plaintiff succeeded.

[22] The damage to the farm house is mentioned in support of the finding that the occupiers had fundamentally breached the relationship, even though the magistrate acknowledges that it was not established who was responsible for that damage. The damage done to a zinc dam by the third defendant's son is established, but the third plaintiff himself testified that the child's mother had

approached him and begged him not to press charges because her son was a minor. He agreed not to press charges, so this does not seem to amount to a fundamental breach of the relationship which cannot be remedied.

[23] The finding that 'the current owner of the farm does not feel safe as far as a dog of one of the defendants has been killed' is not valid because the evidence given in this regard by the third defendant was that the third plaintiff had shot his dog under the drum which the municipality fills with water in the yard where the defendants live. He said that the reason given by the third defendant was that the dog chased the cattle, but he says it was a dog that stayed in the yard. There is absolutely no evidence that the third plaintiff felt threatened by the dog.

[24] Section 10(1)(c) requires that it is the occupier who must have committed the 'fundamental breach of the relationship'. In *Conradie v Hanekom and another*¹¹ it was held that a court should examine what precisely constitutes the fundamental breach of the relationship between the owner and each of the occupiers that it is not possible to remedy. The evidence relied upon by the magistrate does not satisfy this test.

[25] The only evidence given by the first plaintiff of wrongful conduct on the part of the defendants was that they had gone on

strike. This was the subject of the dispute which came before the CCMA and cannot alone be grounds for termination of the residence of occupiers protected by section 10 of ESTA. The only substantiated evidence given by the third plaintiff of wrongful conduct was in respect of the damage which the third defendant's son caused to a dam. The third plaintiff and the third defendant's wife reached an agreement that the damage would be paid for and that the minor son would not be prosecuted, which seems to be an attempt to remedy such breach of the relationship as may have occurred.

[26] The third plaintiff, on behalf of the present owner, made it clear that he had avoided having contact with the defendants because he did not consider them to be his problem. He considered them to be the problem of the first respondent, who had given an undertaking that the trust would be given vacant possession of the property. It is not advisable for parties to include such an undertaking in a contract of sale when there are occupiers on the property who are protected by the provisions of ESTA, because it may not be within the power of a seller to fulfil the undertaking.¹²

[26] It has been held that '[t]he requirement in section 10(1)(c) of a fundamental breach of a relationship between an owner and an occupier, relates to a social rather than a legal relationship' and that '[t]here will be a fundamental breach of such a relationship if it is practically impossible for the relationship to continue due to a lack of mutual trust.'¹³ In this case, the trustees of the present owner seem to have deliberately avoided establishing a relationship with the occupiers. If there is no relationship, it cannot be fundamentally breached.

[27] It is possible that an eviction order can be granted in terms of either section 10(2) or section 10(3) of ESTA, but the plaintiffs did not make out a case for such relief. It follows that the eviction order cannot be confirmed and is hereby set aside.

[27] The order as to costs is also set aside. The magistrate granted costs in favour of the plaintiffs on a party and party scale, stating that this was a 'normal order', made because neither party had addressed the court with regard to a specific order as to costs. This reasoning is not correct. Even if the plaintiffs had been entitled to an eviction order, it would not have followed that they were entitled to an order of costs. Over many years the Land Claims Court has established that, with ESTA litigation, the normal practice is to make no order as to costs. Costs are ordered against parties only where there is good reason to do so.¹⁴

_____C. E. LOOTS AJ

24 February 2011

¹Act 62 of [1811] EngR 449; 1997

²Act 66 of 1995

3Paragraph 15 of the particulars of claim states: 'Op 8 Maart 2008 het die Kommissie vir Bemiddeling, Mediasie en Arbitration bevind dat Eerste Verweerder en by implikasie ook Tweede, Derde, Vierde en Vyfde Verweerdersse ontslag regverdig en billik was...'

The defendants' plea did not put the alleged implication in issue.

4The rules of court allow summary judgment applications in respect of claims for eviction, but they also require that it be stated under oath on behalf of the applicant that it is believed that there is no bona fide defence to the claim. The summary judgment application in this matter was dismissed on a point of law, but had this not been so it is fairly certain that it would have been dismissed on the ground that the opposing affidavits disclosed a defence.

5The magistrate's judgement on exception was not part of the record because the transcribers could not find it on the recording machine and furnished a certificate to this effect.

6See s 10(1)(c) of ESTA.

7Section 9(2) of ESTA reads as follows: 'A court may make an order for the eviction of an occupier if-

- (a) the occupier's right of residence has been terminated in terms of section 8;
- (b) 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 person in charge has, after the termination of the right of residence, 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 Land Affairs, for information purposes, not less than two calendar months' written notice of the 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.

7Section 9(2) of ESTA reads as follows:

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

- (a) the occupier's right of residence has been terminated in terms of section 8;
- (b) 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 person in charge has, after the termination of the right of residence, 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 Land Affairs,

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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.

8Paragraph 22 of the particulars of claim. Valid termination of the right of residence does not on its own entitle the owner to an order of eviction: *Mkangeli and others v Joubert and others* 2002

(4) SA 36 (SCA) at 43 para [12]; *Mpedi and others v Swanevelder and others* 2004

(4) SA 344 (SCA) at 348 para [11].

9Section 10(3) sets out the circumstances under which the court can decide whether eviction is just and equitable.

10 2004

(4) SA 344 (SCA).

11 1999

(4) SA 491 (LCC) para [19].

12I am mindful of the decision in *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA), but there the court was dealing with the concept of 'just and equitable' under s 8(1) and decided only that the seller's desire to give vacant possession to a purchaser is one of the factors to be taken into account in deciding what is just and equitable. See para [10] of the judgment.

13*Bouwer N.O. and others v Floors Linnerts and Others* LCC 225/2009 2 Dec 2010 at para [36], citing *Ovenstone Farms (Pty) Ltd v Arends and Others* LCC 60/R02 and *Henri NR du Plessis Trust v Kammies* LCC 77R/01.

14See *Erasmus v Mothoale en ander* LCC 62R/1999 para [7]; *Serole and another v Pienaar* [1999] 1 All SA 562 (LCC) para [19]; and *Skosana and others v Roos t/a Roos se Oord and others* 2000

(4) SA 561 (LCC) para [30].

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