

SOUTH AFRICA / JUDGMENT

Theo Dicke (Pty) Ltd v Machete Snr and Another (LCC 22/2012) [2013] ZALCC 2 (23 January 2013)

[2013] ZALCC 2

COURT
Land Claims Court

BEFORE
Y Sidlova

CASE / FILE NUMBER
LCC 22/2012

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IN THE LAND
CLAIMS COURT OF SOUTH AFRICA
HELD IN RANDBURG
CASE
NUMBER: LCC:
22/2012
Decided on: 23
January 2013
In the matter

between: THEO DICKE (PTY)
LTD
.....Applicant
and
MAMOYABO MACHETE
SNR
.....First
Respondent
DORAH MACHETE
.....Second
Respondent

JUDGMENT

SIDLOVA AJ:

Introduction

- [1] This is an application in which the owner of the remaining extent of the farm Spitsrand 422 LT situated in the Province formerly known as Transvaal (the farm), is seeking an order declaring that the second respondent acted unlawfully by constructing a dwelling on the farm without the permission of the applicant. The applicant is further seeking an order directing the second respondent to vacate the said dwelling. In addition the second respondent be ordered to demolish the new dwelling and be prohibited from erecting any further structures without express written permission from the applicant. As against the first respondent, the applicant seeks an order prohibiting her from enabling or assisting unauthorised persons, including the second respondent, to establish new dwellings on the farm without the express and written permission of the applicant.

Background facts

- [2] The founding affidavit is deposed by Mr Theo Dicke, the managing director of the applicant. He alleges that he is 72 years old, that he was born on the farm and that he has lived there his whole life. His family's ownership and occupation of the farm goes back to 1893.
- [3] The first respondent is an elderly woman whose late husband worked on the farm. She is a long-term occupier as contemplated in terms of section 8 of the Extension of Security of Tenure Act (ESTA).¹ As such she has the right to reside on the property with her dependants until she passes away, unless the right of residence is terminated in terms of section 8(4) of ESTA.² Mr Dicke says that he has not terminated her right of residence. She lives in one of seven brick houses which were constructed by the landowner for farm workers to reside in.
- [4] The second respondent is the granddaughter of the first respondent. The applicant contends that she is not an 'occupier' as defined in ESTA,³ but he accepts that she has the right to reside on the farm as a family member of the first respondent. The second respondent's late mother (daughter of the first respondent) worked for Mr Dicke. She built a traditional wattle and daub house next to the house of the first respondent with the permission of Mr Dicke. After her death, the second respondent continued to live in this house with her two younger siblings and her daughter.
- [5] Mr Dicke states in his affidavit that towards the end of November 2011 he was away in the Eastern Cape when he received a telephone call from the second respondent on his cell phone. She asked him whether she could build her own house on the farm. He says that he declined the request and told her that in any event he could not discuss the topic over the phone since he was having difficulty hearing her.

- [6] He says that on his return from the Eastern Cape he spent only one day at the farm and then went on holiday to Zimbabwe with his wife for about ten days. When they returned to the farm in mid-December 2011, he discovered that the second respondent had, without permission and despite his refusal of her request, constructed a new dwelling, built with brick and mortar, some distance away from the traditional dwelling that she had been occupying.
- [7] Mr Dicke says in his affidavit that he immediately confronted the second respondent and asked why she had built the house despite him having refused her permission to do so. He says that she acknowledged that he had not given her permission. He told her that the house could not remain on the farm. She then proposed that she should buy the piece of land on which she had erected the house. He responded that this was legally and practically impossible. In January 2012 the applicant's attorney addressed a letter to the second respondent calling upon her to vacate the new dwelling and demolish the house. The second respondent has not been called upon to vacate the farm. Mr Dicke says that she can either return to her previous dwelling or live with her grandmother.
- [8] In her opposing affidavit the second respondent says that the traditional mud house in which she, her two younger siblings and her daughter lived posed a risk to their lives. She alleges that they lived in fear that 'the house would fall on them due to its dilapidated condition.' She denied that she constructed the new dwelling without the permission of the applicant. She admitted that she made a call to Mr Dicke on about November 2011 and says that when she asked for permission to build a house on the farm he never gave an answer. Based on how the conversation went, she assumed that everything was fine. Mr Dicke's

response to this in his replying affidavit was that on her own version she did not receive permission to build a new house, she

simply assumed that everything was fine.

Issues Raised

- [9] The following issues were referred to oral evidence in terms of rule 30(8)(a) of the Land Claims Court rules:

Whether the applicant is the owner of the property

Whether the second respondent is an occupier in her own right

Whether the second respondent received tacit consent from the applicant to construct a new dwelling

Whether the traditional house that was occupied by the respondent until January 2012 can be repaired

- [10] The first of these issues was conceded by counsel for the respondents and accordingly does not have to be decided.

- [11] With regard to the second issue, the court is satisfied that there is no evidence to establish that the second respondent is an occupier in her own right. She initially occupied as the daughter of her late mother. When her mother died, she, her two younger siblings and her daughter continued to occupy the dwelling as family members of her grandmother, the first respondent.⁴ The second respondent was never given express consent to occupy in her own right and the deeming provisions of section 3(4) and
- (5) of ESTA do not apply in respect of family members.⁵
- [12] Mr Dicke and the second respondent both gave oral evidence with regard to the issue of whether the second respondent received tacit consent to construct a new dwelling. Having heard their evidence, I am satisfied that tacit consent was not given. The action of the second respondent in constructing this dwelling without authorisation was accordingly unlawful and the conduct of the first respondent, to the extent that she may have enabled or assisted her to do this, was unlawful.⁶
- [13] The applicant called an experienced builder to give evidence as to whether the traditional house could be repaired. His evidence was that this is definitely possible and that such houses need to be regularly maintained by applying fresh mud and replacing poles when necessary. He also gave evidence that such a house can be built without getting building plans approved, whereas the building of a brick and mortar house is unlawful without approval of plans because it poses a serious threat to the occupiers if it collapses, since it is made of heavy material. His evidence was not contradicted. The fourth question is accordingly affirmatively answered.
- [14] What remains to be decided is whether the applicant is entitled to the relief which it claimed. As far as the declaratory relief claimed in paragraph 1 of the notice of motion is concerned, I have already decided that the second respondent's conduct in building a new dwelling without authorization from the landowner is unlawful. The Land Claims Court has the same powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings.⁷ It accordingly has the power to grant a declaratory order. ⁸
- [15] In respect of the relief claimed against the second respondent in paragraph 2 of the notice of motion, it is important to emphasise that it is not an eviction which is claimed, therefore the provisions of ESTA which regulate the granting of an eviction order do not apply. The applicant has claimed an order that the second respondent must vacate the new dwelling and demolish it. This amounts to a mandatory interdict and the usual requirements for a final interdict apply. ⁹ The purpose of a mandatory interdict is to remedy the effects of unlawful action already taken.¹⁰ The normal requirements for an interdict apply both in respect of the mandatory relief claimed in paragraphs 2 and 4 of the notice of motion and in respect of the prohibitory interdict claimed in paragraph 5. Once these requirements have been satisfied the court has very little discretion to refuse an interdict.¹¹

- [16] The applicant as the owner of the farm obviously has the right to control what structures are erected thereon. The second respondent's conduct in building a new dwelling without authorisation from the landowner is harmful to the landowner as it may result in other people thinking they have a right to erect buildings anywhere at the farm without permission. The only adequate remedy in the circumstances is the relief claimed.
- [17] The relief claimed against the first respondent in paragraph 6 of the notice of motion is a prohibitory interdict, to which the normal requirements for a final interdict also apply. The first requirement is a clear right, which is satisfied by reference to section 6(3) (d) of ESTA.¹² The second requirement is reasonable apprehension of harm. The fact that the first respondent has previously allowed a family member to establish a new dwelling on the land in question makes the apprehension that she may do so again reasonable. The third requirement is that there should be no other adequate remedy. Evidently the only remedy that can give effect to the provisions of the prohibition contained in section 6(3) (d) of ESTA is an interdict.
- [18] The applicant has also asked for a costs order against the second respondent. The usual rule followed in this court is that no order of costs should be made unless there is good reason to do so.¹³ In *Singh and Others v North Central and South Central Council and Others*

[1999] 1 All SA 350 (LCC) it was held that:

"On that approach the court will generally decline to make a costs order unless there are special circumstances present."

However the *Singh* matter deviated from the general rule because the Court found that the conduct of the applicant's attorney was so inappropriate

that a cost order was necessary, such is not the case in *casu* and I am not persuaded that I should deviate from this rule.

Order

The following order is accordingly made –

The second respondent is declared to have acted unlawfully by constructing a dwelling on the Remaining extent of farm Spitsrand 422 LT

The second respondent is ordered to vacate the new dwelling by the 28th of February 2013.

The Sheriff for the district of Letaba, Limpopo Province, is authorised to remove the second respondent and all persons residing in the new dwelling, on the 4th of March 2013, if they have not complied with the order in paragraph (b) above.

The second respondent is ordered to demolish the new dwelling by the 28th of February 2013.

The second respondent is prohibited from building or erecting any further structures without the express written permission of the applicant.

The first respondent is prohibited from enabling or assisting unauthorised persons, including the second respondent, to establish new dwellings on the farm Spitsrand 422 LT without the express written permission of the applicant.

There is no order as to costs.

Y SIDLOVA

ACTING JUDGE: LAND CLAIMS COURT

For the applicant: Advocate Havenga

Instructed by: P Moolman of Pieter Moolman Attorneys

For the respondents: Advocate Ngwetjana

Instructed by: S K Rachoene of Rachoene Attorneys

1Act 62 of 1997.

2Section 8(4) provides that the right of residence of an occupier who has resided on the land in question for 10 years and has reached the age of 60 years may not be terminated unless that occupier has committed a breach contemplated in s 10(1)(a), (b) or (c).

3See the definition in s 1 of the Act.

4Section 6(2)(d) of ESTA gives occupiers the right to family life in accordance with the culture of that family.

5R&V Beleggings (Edms) Bpk v Lukhele [2005] Jol 15724 (LCC); Ntshange Trustees v The Trustees of the Terblanche Gesin Familie Trust & another [2003] JOL 10996 (LCC) and Ntuli and Others v Smit and Another [1999] 2 All SA 1 (LCC).

6Section 3(d) of ESTA provides that an occupier may not enable or assist unauthorised persons to establish new dwellings on the land in question.

7Section 22(2)(a) of the Restitution of Land Rights Act 22 of 1994.

8See s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959. Declaratory orders are dealt with in Chapter 43 of Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa Juta 5th Ed by Cilliers, Loots & Smith Vol 2 beginning at 1428.

9As to these requirements, see Herbstein & van Winsen supra Vol 2 at 1456 and the cases there cited.

10Ladychin Investments (Pty) Ltd v South African National Roads Agency 2001

(3) SA 344 (N) at 356—357

11United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T); Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992 (2) SA 459 (C). Cf Huisamen v Municipality of the City of Port Elizabeth [1997] 2 All SA 458 (E) 465c–h, 1998 (1) SA 477 (E) 483; North Safety Products (Africa) v Nicolay [2007] 3 All SA 647 (C) 656–657. The statement in the text was not accepted in Chapmans Peak Hotel (Pty) Ltd v Jab and Annalene Restaurants CC t/a O’Hagans [2001] 4 All SA 415 (C) 421

12See footnote 6 above.

13Singh and Others v North Central and South Central Council and Others

[1999] 1 All SA 350 (LCC) where it was held that: “On that approach the court will generally decline to make a costs order unless there are special circumstances present.” However this matter deviated from the general rule because the Court found that the conduct of the applicant’s attorney was so inappropriate that a Cost order was necessary, such is not the case in the present case.

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