

SOUTH AFRICA / JUDGMENT

Van Dyk and Another v Mthimunye and Another (LCC 38/02) [2003] ZALCC 32 (26 May 2003)

[2003] ZALCC 32

COURT

Land Claims Court

BEFORE

Gildenhuys

CASE / FILE NUMBER

LCC 38/02

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

Held

at RANDBURG

on 14 February, 3 April and 24 April 2003

before

Gildenhuys

J CASE

NUMBER:

LCC 38/02

Decided

on: 26 May 2003 In the matter between:

VAN

DYK, FJ N.O, First

Plaintiff

VAN

DYK, HH N.O. Second

Plaintiff

and

MTHIMUNYE,

MJ First

Defendant

MTHIMUNYE,

EN Second

Defendant

JUDGMENT

GILDENHUYS AJ:

[1] The plaintiffs in this matter are the trustees of the van Dyk Boerdery Trust ("the Trust"). The Trust is the owner of the Remaining Extent of the farm Eerstelingfontein No 406 JT, Mpumalanga Province ("Eerstelingfontein"). The first defendant together with his wife (the second defendant) and their family live on Eerstelingfontein. He alleges that he is an "occupier"

as defined in section 1(1) of the Extension of Security of Tenure Act¹ (the "Tenure Act") and is also a "labour tenant" as defined in section 1 of the Land Reform (Labour Tenants) Act² (the "Labour Tenant Act"). The first defendant was previously employed by the Trust on Eerstelingfontein. Although he no longer works on Eerstelingfontein, he testified that he considers the farm to be his permanent place of residence. The second defendant derives her right (if any) to stay on the farm from her relationship with the first defendant.

[2] The Trust bought Eerstelingfontein from a company known as Omnia Boerdery (Edms) Bpk ("Omnia") during July 1997. At that point in time, the defendants were living on the farm. They have been living there for many years. The first defendant (and intermittently also the second defendant) worked for Omnia. Clause 14 of the Deed of Sale between Omnia and the Trust provides as follows:

"Die VERKOPER waarborg hiermee voile, vrye en ongestoorde besit aan die KOPER. In hierdie verband plaas die partye op rekord dat die VERKOPER sal sorg dat alle arbeiders, en ander okkupante die eiendom ontruim voor datum van registrasie van die eiendom in KOPER se naam. Die KOPER onderneem egter om oorweging te skenk aan die indiensneming van die huidige Arbeiders maar sal nie verplig wees om dit te doen nie."

[3] The Trust offered employment to some of the workers previously employed by Omnia, but not to the defendants. The first defendant

received a sum of money from Omnia to compensate him for the termination of his employment and for moving out of Eerstelingfontein. The second respondent in her evidence referred to it as a pension, and said they drew money against the amount of the pension from the bank. After looking for work for some time, the first defendant took up employment (as from November 1997) with a certain Mr W Stolz on a nearby farm named Geluk. He signed a service agreement with Mr Stolz. He and his family took up residence on Geluk, in a dwelling (a converted stable) provided by Mr Stolz. According to the first defendant, Mr Stolz was very happy with his work in the beginning, and intimated that the first defendant must stay with him "until his last days on earth". During May

1999, however, Mr Stolz retrenched him.

- [4] The first plaintiff, Mr FJ van Dyk, testified that the first defendant came to him to look for work on 5 July 1999. The Trust then employed him as a tractor driver. His employment terms included the right to occupy an existing worker's house on Eerstelingfontein. It is a four room structure made out of bricks and corrugated iron, approximately 55 to 60 square meters in extent. It has running water. Electricity is also available, but at the occupier's own expense. It can be accessed through a meter system operated by pre-paid cards. He received a salary of R450.00 per month, 80kg mealie meal per month, overalls for work, shoes once a year and a cash bonus (depending upon farm profits) twice a year. He was given the right to graze two cows and two calves on the farm. He had no cropping rights. The defendants and their children moved into the house on Eerstelingfontein during August 1999. The house is not the same structure as the one in which they lived before they left Eerstelingfontein during 1997. That was a mud structure. It was demolished by unknown persons after the defendant had left.
- [5] On the morning of 30 January 2001 an altercation took place at the defendant's house between the first plaintiff and the first defendant. The first defendant tapped electricity from an adjoining vacant worker's house and led it to his house. The first plaintiff alleged that it was done in a manner which bypassed the meter, and he accused the first defendant of misappropriating the electricity. The first defendant admitted the tapping, but alleged that he did not by-pass the meter and did no more than utilize the electricity left over on the meter card of the previous occupant of the vacant house. According to him, he did that with the full knowledge and consent of the previous occupant. The first plaintiff testified that he was losing a considerable sum of money through the unauthorised appropriation of electricity by some of his workers. When he saw what the first defendant was doing, he expressed his displeasure and told the first defendant that the matter will be raised at the next worker's meeting. The first plaintiff then left, but gave the first defendant a lift in his vehicle to his work. The first defendant worked the full day, but did not return to work the next day, or ever thereafter. The first defendant put forward a contrary version. He testified that the first plaintiff dismissed him in very crude language during the altercation. This was confirmed in evidence by the second defendant, who was present at the time. Both defendants admitted, however, that the first plaintiff took the first defendant to work in his vehicle and that he worked the entire day.
- [6] When the first defendant did not return to work, he was dismissed on 16 February 2001 for absconding from work. He and his family were given 60 days notice to vacate the house. The defendants did not vacate the house. On 27 February 2001, a certain Mr Khumalo (an official from the Department of Land Affairs) together with officials from TRAC arrived at the farm. In their presence the first plaintiff explained to the first defendant that the Trust no longer wants to employ him and that he must vacate the house. According to the first plaintiff, the officials made threats to him, intimating that it will cost him a lot of money to have the defendants evicted, that stock theft might occur, that there might be another farm murder, and that a situation could develop which will be worse than that in Zimbabwe. Some correspondence then passed between the first plaintiff and the Department of Land Affairs.

The correspondence culminated in a letter dated 9 March 2001 from the Department of Land Affairs to the first plaintiff, reading as follows:

"

1. Mr. M.J. Mthimunye's issue has been accordingly referred to the CCMA.
2. In terms of Section 23 (1-2) of Extension of Security of Tenure Act 62 of 1997 any obstruction or interference with an official in the performance of his/her duties is a criminal offence and shall be dealt with as such.
3. Any notice in respect of an eviction should contain the necessary information and the relevant procedures must be followed. Any deviation below this standard will not be accepted."

When the defendants failed to vacate the farm, the Trust applied for their eviction. The proceedings were initially lodged in a Magistrate's Court. Apparently the application was defective, and it was subsequently abandoned. The Trust then commenced fresh proceedings in this Court.

- [7] The second defendant testified about some serious assaults which the first plaintiff allegedly carried out upon the defendants after the first defendant's dismissal. The first plaintiff was arrested on these complaints and charged in the Magistrate's Court, where he was found not guilty. All Mr Magagula, who appeared for the defendants, put to the first plaintiff about the assaults during cross-examination was the following question:

*

"Meneer, albei die verweerders sal vir die hof se dat na hierdie insident random die elektrisiteit, u het begin om hulle aan te rand. Dis hoekom klagtes teen u gemaak was"

The first plaintiff denied the assaults.

- [8] There are only three disputed issues of any substance before me in this case. The first disputed issue is whether any of the defendants are labour tenants. They allege that they are and they claim protection from eviction under section 14 of the Labour Tenant Act. Section 14 reads as follows:

"No labour tenant may be evicted while an application by him or her in terms of Chapter III is pending: Provided that the Court may order eviction if it is satisfied that special circumstances exist which make it fair, just and equitable to do so, taking all the circumstances into account."

Chapter III of the Labour Tenant Act provides for the acquisition of ownership or other rights in land upon application by a labour

tenant. It is common cause that such an application was lodged and is in fact pending with the Department of Land Affairs. It is not clear who the applicants are: the first defendant or the second defendant or both of them. The Trust denies that either of them is a labour tenant,

[9] The other two disputes relate to the protection against eviction which the two defendants might enjoy under the Tenure Act. It is quite possible for a person to be a labour tenant (as defined in the Labour Tenant Act) and at the same time also an occupier (as defined in the Tenure Act). If the defence under the Labour Tenant Act succeeds in this matter, it will not be necessary to consider the defences under the Tenure Act.

[10] The requirements for an eviction order under the Tenure Act are firstly that the occupier's right of residence must have terminated,

secondly that the occupier has not vacated the land within a period of notice given to him, thirdly that the conditions for an eviction order in terms of section 10 or 11 have been complied with, and lastly that certain requisite notices have been given to the occupier, the municipality concerned and the provincial office of the Department of Land Affairs. The second dispute before me is whether the first defendant's right of residence was validly terminated. The third dispute before me is whether the requirements of section 10 or II of the Tenure Act have been satisfied.

[11] I turn to the first dispute. I will assume in defendants' favour, without so deciding, that immediately before they left Eerstelingfontein and moved to Mr Stolz's farm Geluk, one or both of them were labour tenants (as defined). The definition of "labour tenant" as contained in the Labour Tenants Act is as follows:

"labour tenant" means a person -

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

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 right provides or has provided labour to the owner or lessee; and

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:"

There was no serious suggestion on behalf of the defendant that the conditions upon which the first defendant was employed by the Trust made the first defendant a labour tenant and not a farm worker. The defendants contend that one or both of them were already labour tenants when they moved to Geluk, and that they have not ceased to be labour tenants any time thereafter.

[12] The rights of a labour tenant under the Labour Tenant Act may come to an end under certain circumstances. These are set out in sections 3(2) and (3), which read:

"(2) The right of a labour tenant to occupy and to use a part of a farm as contemplated in subsection (1) together with his or her family members may only be terminated in accordance with the provisions of this Act, and shall terminate -

- (a) subject to the provisions of subsection (3) to (7), by the waiver of his or her rights;
 - (b) subject to the provisions of subsection (4) and (5), on his or her death;
 - (c) subject to the provisions of section 10, on his or her eviction; and
 - (d) on acquisition by the labour tenant of ownership or other rights to land or compensation in terms of Chapter HI.
- (3) A labour tenant shall be deemed to have waived his or her rights if he or she with the intention to terminate the labour tenant agreement -

- (a) leaves the farm voluntarily; or
- (b) appoints a person as his or her successor."

[13] The defendants left Eerstelingfontein after the first defendant took up employment with Mr Stolz during November 1997. He accepted a severance payment when he left Omnia's employ. He entered into a service agreement with Mr Stolz. The service agreement provided that the first defendant would receive housing as a fringe benefit. The first defendant was also given grazing rights for four heads of cattle. The employment agreement was subject to four weeks notice of cancellation by either party to the other. Mr Stolz testified that he requested the first defendant during May 1999 to find other employment. The first defendant took the matter to the CCMA and a hearing took place at Ermelo. The first defendant did not attend the hearing. Apparently nothing more came of the CCMA complaint. On 1 July 1999 the first defendant took up employment on Eerstelingfontein, and he and his family moved to Eerstelingfontein a month-later.

[14] The evidence given by the first defendant is to the effect that his move to Mr Stolz was only temporary. Mr Stolz denied any knowledge of its alleged temporary nature. The first defendant testified that when the Trust took over Eerstelingfontein, the first plaintiff told him that he did not have work for him at the time, that he would have work when certain equipment arrived, and that for the meantime he should seek temporary employment elsewhere. He found employment with Mr Stolz. He left Mr Stolz 19 months later because Mr Stolz told him that he had no more work for him. According to the first defendant, the first plaintiff at that very time called upon him to come back to Eerstelingfontein. Despite the evidence given by the first defendant, the second defendant insisted during her examination in chief that Mr Stolz did not dismiss her husband and that they left the farm Geluk because they "loved to be on Eerstelingfontein. Under cross-examination, she conceded that Mr Stolz told her husband that he has no money to pay him any more. They then left. The first plaintiff denied that he ever called upon the first defendant to come back to Eerstelingfontein, and testified that the first defendant approached him for work after Mr Stolz retrenched him.

[15] It appears to me, on the probabilities, that when the defendants left Eerstelingfontein during 1997, they did so voluntarily, and that it was not intended to be a temporary absence only. I have come to this conclusion for the following reasons:

- (a) the first defendant accepted a severance package from Omnia when he left Eerstelingfontein during 1997;
- (b) Mr Stolz was not informed that the first defendant would work for him on a temporary basis only, nor does the employment contract reveal such an intention;
- (c) the mud structure in which the defendants lived on Eerstelingfontein was broken down after the defendant had left (albeit not by the defendants, who only took some of the building material with them); the first defendant admitted that he did not complain about the demolition at the time;

the first defendant complained to the CCMA after Mr Stolz asked him to leave; and

it is unlikely that the Trust would have committed itself to employ the first defendant on the arrival of certain equipment. The first defendant was away for 19 months, which is a long time to wait for equipment. It is also too much of a coincidence that the call-back by the first plaintiff just happened to coincide with the first defendant's retrenchment by Mr Stolz. It is much more likely that when Mr Stolz asked him to leave, he approached the first plaintiff for work, and it so happened that the Trust then had work for him.

[16] Because the defendants left Eerstelingfontein voluntarily during or about the end of 1997, they are, in terms of section 3(2)(a) read with section 3(3)(a) of the Labour Tenant Act, deemed to have waived any rights which they might have had as labour tenants. Their return to Eerstelingfontein 19 months later does not revive their rights. Consequently, the defendants cannot rely on section 14 or on any other provision of the Labour Tenant Act to prevent their eviction.

[17] I will now deal with the issues under the Tenure Act. The first issue is whether the right of residence of the first defendant was validly terminated. It is common cause that the second defendant has never worked for the Trust. Any right which she may have to reside on Eerstelingfontein must be derived from the first defendant.³ The first defendant was an employee of the Trust and his right of residence arose solely from his employment agreement. Section 8(2) of the Tenure Act provides:

"(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act."

[18] The first defendant maintains that his dismissal was not in accordance with the Labour Relations Act.⁴ That is not for me to decide. If the first defendant wanted to attack the legality of his dismissal, he should have done so through

the CCMA and in accordance with the procedures contained in the Labour Relations Act.⁵ There is no evidence before me of any ruling by or pending dispute before any of the structures of the Labour Relations Act. [19] I come to the third issue. Section 11 of the Tenure Act (and not section 10) is applicable because the first defendant became an occupier during 1999. Any previous rights which he might have had did not survive his departure from Eerstelingfontein during

1997. An eviction order against the defendants must be supported by a positive evaluation of the considerations contained in section 11 of the Tenure Act. Section 11(2) and (3) reads as follows: "(2) ... a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so. (3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to - (a) the period that the occupier has resided on the land in question; (b) the fairness of the terms of any agreement between the parties; (c) whether suitable alternative accommodation is available to the occupier; (d) the reason for the proposed eviction; and (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land." [20] I return to the confrontation between the first plaintiff and the defendants about the electricity on 30 January 2001. The first defendant admitted that, before the confrontation, he had no problems with the first plaintiff. Both defendants gave evidence of very crude swearing on the part of the first plaintiff during the confrontation, and that the first plaintiff dismissed the first defendant instantly and in appalling language. This is quite contrary to the first plaintiff's version. On the probabilities, I accept the first plaintiff's version, for the following reasons:

(a) no reason was suggested why the first plaintiff would be offended if there was nothing wrong with tapping the electricity; previously,

there was a good relationship between the parties; and

(b) "it is difficult to fathom a reason why the first plaintiff, immediately after the confrontation, would give the first defendant a lift to his work if it was true that he had just dismissed him. The kindness of offering a lift is also not congruous with his alleged severe verbal attack on the first defendant. [21] There are alleged incidents of malicious damage to property committed by the defendants' children, and accusations against the defendants of fomenting unrest amongst the workforce on Eerstelingfontein. There are allegations of threats against the first plaintiff by Mr Khumalo (of the Department of Land Affairs) and by officials from TRAC. The defendants denied most of the

allegations and incidents, but admitted a few and attempted to explain them away. There are also allegations of assault against the first plaintiff. I need not dwell on these allegations in any detail, or make any finding on them, except to conclude that they manifest a complete breakdown of the relationship between the parties which, in my view, is irretrievable. I should add, however, that the failure to put the allegations of assault to the first plaintiff in any detail during his cross-examination, and the finding by the Magistrate's Court that the first plaintiff is not guilty on these charges, leads me to regard the allegations of assault with some scepticism. [22] I consider it just

and equitable that an eviction order be granted against the defendants for the following reasons:

- (a) the first defendant has not been an occupier on Eerstelingfontein for a long time; he came back only during 1999;
- (b) it is not fair that the defendants be allowed to continue living on Eerstelingfontein indefinitely after the first defendant's

employment was terminated as long ago as February 2001; since then, they have had ample time to look for an alternative abode; the Trust has received no recompense in respect of their continued occupation of the house on Eerstelingfontein;

- (c) it seems likely that the first defendant was in fact guilty of wrongfully tapping electricity; that dishonesty and his subsequent

denial and abscondment will make it difficult for the Trust to regain confidence in him and to re-employ him;

- (d) it is manifest from what happened after the dismissal that the relationship between the parties has broken down entirely, and that it is not likely to be restored; and (e) the first defendant has access to accommodation at his present place of work near Carolina. Unfortunately, it was not canvassed

during the hearing whether such accommodation is suitable for the needs of the defendants and their family. [23] I conclude that the plaintiffs (as trustees of the Trust) are entitled to an eviction order against the defendants. The defendants

did not erect improvements on Eerstelingfontein (after their return during 1999), and they have no standing crops. There are no outstanding wages due to the first defendant. There is therefore no need for me to make any order in terms of section 13(1) of the Tenure Act. [24] For the reasons set out above, it is ordered as follows:

- (a) the defendants must vacate the farm Eerstelingfontein by 4 July 2003;
- (b) if the defendants have not vacated the farm Eerstelingfontein by 4 July 2003, the eviction order may be carried out on 7 July 2003 or thereafter; and
- (c) no order is made as to costs. JUDGE A GILDENHYUS For the applicant: Philip du Toit Inc, Pretoria. For the respondents: Nelspruit Justice Centre, Nelspruit.

[18] The first defendant maintains that his dismissal was not in accordance with the Labour Relations Act.⁴ That is not for me to decide. If the first defendant wanted to attack the legality of his dismissal, he should have done so through

the CCMA and in accordance with the procedures contained in the Labour Relations Act.⁵ There is no evidence before me of any ruling by or pending dispute before any of the structures of the Labour Relations Act.

[19] I come to the third issue. Section 11 of the Tenure Act (and not section 10) is applicable because the first defendant became an occupier during 1999. Any previous rights which he might have had did not survive his departure from Eerstelingfontein during

1997. An eviction order against the defendants must be supported by a positive evaluation of the considerations contained in section 11 of the Tenure Act. Section 11(2) and (3) reads as follows:

"(2) ... a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.

(3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to -

- (a) the period that the occupier has resided on the land in question;
- (b) the fairness of the terms of any agreement between the parties;
- (c) whether suitable alternative accommodation is available to the occupier;
- (d) the reason for the proposed eviction; and
- (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land."

[20] I return to the confrontation between the first plaintiff and the defendants about the electricity on 30 January 2001. The first defendant admitted that, before the confrontation, he had no problems with the first plaintiff. Both defendants gave evidence of very crude swearing on the part of the first plaintiff during the confrontation, and that the first plaintiff dismissed the first defendant instantly and in appalling language. This is quite contrary to the first plaintiff's version. On the probabilities, I accept the first plaintiff's version, for the following reasons:

- (a) no reason was suggested why the first plaintiff would be offended if there was nothing wrong with tapping the electricity; previously,

there was a good relationship between the parties; and

- (b) "it is difficult to fathom a reason why the first plaintiff, immediately after the confrontation, would give the first defendant a lift to his work if it was true that he had just dismissed him. The kindness of offering a lift is also not congruous with his alleged severe verbal attack on the first defendant.

[21] There are alleged incidents of malicious damage to property committed by the defendants' children, and accusations against the defendants of fomenting unrest amongst the workforce on Eerstelingfontein. There are allegations of threats against the first plaintiff by Mr Khumalo (of the Department of Land Affairs) and by officials from TRAC. The defendants denied most of the

allegations and incidents, but admitted a few and attempted to explain them away. There are also allegations of assault against the first plaintiff. I need not dwell on these allegations in any detail, or make any finding on them, except to conclude that they manifest a complete breakdown of the relationship between the parties which, in my view, is irretrievable. I should add, however, that the failure to put the allegations of assault to the first plaintiff in any detail during his cross-examination, and the finding by the Magistrate's Court that the first plaintiff is not guilty on these charges, leads me to regard the allegations of assault with some scepticism.

[22] I consider it just and equitable that an eviction order be granted against the defendants for the following reasons:

- (a) the first defendant has not been an occupier on Eerstelingfontein for a long time; he came back only during 1999;
- (b) it is not fair that the defendants be allowed to continue living on Eerstelingfontein indefinitely after the first defendant's

employment was terminated as long ago as February 2001; since then, they have had ample time to look for an alternative abode; the Trust has received no recompense in respect of their continued occupation of the house on Eerstelingfontein;

- (c) it seems likely that the first defendant was in fact guilty of wrongfully tapping electricity; that dishonesty and his subsequent

denial and abscondment will make it difficult for the Trust to regain confidence in him and to re-employ him;

- (d) it is manifest from what happened after the dismissal that the relationship between the parties has broken down entirely, and that it is not likely to be restored; and
- (e) the first defendant has access to accommodation at his present place of work near Carolina. Unfortunately, it was not canvassed

during the hearing whether such accommodation is suitable for the needs of the defendants and their family.

[23] I conclude that the plaintiffs (as trustees of the Trust) are entitled to an eviction order against the defendants. The defendants

did not erect improvements on Eerstelingfontein (after their return during 1999), and they have no standing crops. There are no outstanding wages due to the first defendant. There is therefore no need for me to make any order in terms of section 13(1) of the Tenure Act.

[24] For the reasons set out above, it is ordered as follows:

- (a) the defendants must vacate the farm Eerstelingfontein by 4 July 2003;

(b) if the defendants have not vacated the farm Eerstelingfontein by 4 July 2003, the eviction order may be carried out on 7 July 2003 or thereafter; and

(c) no order is made as to costs.

JUDGE A GILDENHYUS

For the applicant:

Philip du Toit Inc, Pretoria.

For the respondents:

Nelspruit Justice Centre, Nelspruit.

1 Act 62 of 1997 (as amended).

2 Act 3 of 1996 (as amended).

3 See Landbou Navorsingsraad v Klaasen LCC83R/0I, 29 October 2001, available from www.law.wits.ac.za.

4 Act 66 of 1995, as amended.

5 TheewaterskloofHoldings (Edms) Bpk, Glaser A/deling v Jacobs en andere 2002

(3) S A 40! (LCC) at par [15]; Mostert v Duiker and Another 2003 (1) SA 295 (LCC) at par [8]-[9J.

5 TheewaterskloofHoldings (Edms) Bpk, Glaser A/deling v Jacobs en andere 2002

(3) S A 40! (LCC) at par

[15]; Mostert v Duiker and Another 2003 (1) SA 295 (LCC) at par [8]-[9J.

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