

SOUTH AFRICA / JUDGMENT

Vredenhof Organic Estate (Pty) Ltd v Hendriks and Another (LCC 111/2010) [2011] ZALCC 1 (11 February 2011) [2011] ZALCC 1

COURT
Land Claims Court

BEFORE
C E Loots, Y S Meer

CASE / FILE NUMBER
LCC 111/2010

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)
APPEAL CASE NO: LCC 111/2010

MAGISTRATE'S COURT 2724/09
CASE NO: Heard on 29th November
2010

In the matter between: VREDENHOF
ORGANIC ESTATE (PTY) LTD
.....Appellant
and
WILLIE
HENDRIKS
.....First
Respondent
HAZEL PHILLIPS
.....Second
Respondent

JUDGMENT**LOOTS AJ**

- [1] This is an appeal against the decision of a Magistrate in a case which was heard in the Stellenbosch Magistrate's Court under case number 2729/09. The Magistrate refused to grant an order for the eviction of the respondents in an application brought in terms of the Extension of Security of Tenure Act (ESTA).¹
- [2] The appellant sought an order evicting the respondents from a cottage that they occupy on Portion 4 of the farm Vredenhof, No 1047, Division Stellenbosch, Province Western Cape (the farm), which is owned by the appellant company.
- [3] It is common cause that the respondents are occupiers as defined in terms of section 1 of ESTA and that both were previously employed by the appellant. The first respondent alleged that he and the second respondent were residing on the farm with the consent of the previous owner of the farm on 4th February 1997, which would make section 10 of ESTA applicable to them. The appellant did not admit this fact, but in argument before the magistrate its counsel conceded that section 10 of the Act was applicable.
- [4] On 25th June 2008 the first respondent was dismissed by the appellant following a disciplinary hearing. On 8th May 2009 the second respondent was also dismissed following a disciplinary hearing. Both respondents referred their dismissals to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act (LRA).² During July 2009 both matters were settled. Each settlement was recorded on a standard-form CCMA document.
- [5] The CCMA agreement form in respect of the first respondent recorded that he would be paid an amount of R5 000. The CCMA agreement form in respect of the second respondent recorded that she would be paid an amount of R5 692. On 31st July 2009 the appellant paid these amounts to the respondents and gave them written notice to vacate the cottage within 30 days. When the appellants failed to vacate the premises, the appellant brought an application for their eviction in the Stellenbosch Magistrate's Court.
- [6] The Magistrate held that the first respondent's contract had not been lawfully terminated in terms of the LRA, which meant that his right of residence on the farm had not been lawfully terminated in terms of section 8 (2) of ESTA and accordingly one of the mandatory requirements at section 9 (2) (a) had not been complied with. The Magistrate found that the second respondent's employment had been lawfully terminated in terms of the LRA and that her right of residence had been terminated in terms of section 8(2) of ESTA. However, it was held that the second respondent could not be evicted because the first respondent has a right to family life in terms of section 6(2)(d) of ESTA.

- [7] In essence, the appellant's grounds of appeal are that the Magistrate erred in finding that the first respondent's employment was not lawfully terminated in terms of the LRA; that the CCMA did not have jurisdiction to facilitate the settlement agreements between the appellant and the respondents; that the agreement of settlement facilitated by the CCMA could not be enforced against the first respondent because it constituted a waiver of his rights in terms of ESTA; that the requirements of section 8(2) of ESTA were not complied with; and that the provisions of sections 10 and 11 of ESTA did not need to be investigated.

Was the finding that section 8(2) of ESTA was not complied with because the first respondent's employment had not been lawfully

terminated in terms of the LRA, correct?

- [8] When dealing with an application for eviction arising from the termination of employment in terms of the ESTA the first enquiry that a court must make is whether the right of occupation of the occupiers was lawfully terminated in terms of section 8 of the Act.3 Section 8(2) provides that –

"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."

Section 8(3) provides that –

"Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act."

- [9] As set out in paragraph [6] above, the Magistrate found that the second respondent's employment contract had been lawfully terminated in terms of the LRA, but that the first respondent's had not. The reason for the different findings in respect of the termination of the first respondent's employment and the termination of the second respondent's employment seems to be based on a difference in the words which were written under the heading 'Other' in paragraph 6 of the CCMA standard form settlement agreements. The words inserted under this heading in the first respondent's agreement read –

The applicant understands that he must obtain the bank details to receive the settlement per paragraph

3. This concludes the matter and case is closed.'

The words inserted under this heading in the Second Respondent's agreement read –

'Both parties agree that the termination of employment is due to operational requirements. The employer will complete UIF forms in order for the employee to access UIF benefits.'

Referring to the first respondent's CCMA settlement agreement,⁴ the magistrate says in paragraph 16 of the judgment –

‘Dit blyk egter duidelik dat geen beskikking gemaak was oor die regmatigheid van Eerste Respondent se afdanking nie...’

Referring to the second respondent's CCMA settlement agreement,⁵ the Magistrate says in paragraph 17 of the judgment –

Wat Tweede Respondent se ontslag betref het die KBVA wel ‘n beskikking gemaak oor die regmatigheid van Tweede Respondent se ontslag.’

The two CCMA standard form agreements are the same and have been completed in the same manner, the only significant differences being the different details relating to payment and what was filled in under paragraph 6 as set out above.

[10] The finding by the Magistrate that no agreement was made about the legality of the first respondent's dismissal indicates a lack of understanding of the effect of a settlement agreement which is concluded with the assistance of a conciliator provided by the CCMA. Section 133 of the LRA requires the CCMA to appoint a commissioner to attempt to resolve disputes which have been referred to it in terms of the LRA. Only if a dispute remains unresolved after conciliation will the CCMA arbitrate the dispute and make a finding as to the legality of the dismissal of the employee. The dispute was clearly settled.

[11] Paragraph 18 of the Magistrate's judgment sets out further reasons for finding that the settlement agreements concluded between the appellant and the respondents under the auspices of the CCMA could not be enforced against the respondents. This paragraph reads as follows:

‘18. Dit blyk verder duidelik uit die bepalings van die Wet op Arbeidsverhoudinge dat nog die KVBA nog die Kommissaris die bevoegdheid het om sodanige ooreenkoms te fasiliteer (Art. 133 & 134 van die Wet op Arbeidsverhoudinge). Art. 25(1) van die Wet op die Uitbreiding van Sekerheid van Verblyfreg, 62 van 1997 bepaal dat die afstandoening deur ‘n okkupeerder van sy regte ingevolge hierdie Wet nietig is tensy dit deur hierdie Wet toegelaat word of in ‘n hof bevel vervat is. Die Hof vind dat die ooreenkoms tussen die partye bereik nie afdwingbaar is nie vir die volgende redes:

- 1) ‘IOB9” maak geen melding dat eerste respondent se regte in terme van ESTA aan hom verduidelik was nie;
- 2) Die ooreenkoms is nooit in ‘n hofbevel vervat nie

Ter ondersteuning van bogenoemde argument sien ook die beslissing van KG Mhlangu v Van EEden en Venter LCC 53/99 paragrawe 41 tot 45 en paragraaf 52.’

[12] The finding with regard to jurisdiction is clearly wrong because the disputes that were settled were the disputes about the termination of the respondents' employment, not the dispute about the termination of their rights of residence. However, the second and third findings, which refer to section 25(1), must be considered.

[13] Section 25(1) of ESTA reads as follows:

"The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of a court."

The portion of the judgment in LCC 53/1999, to which the Magistrate refers, concerned a settlement agreement signed by ESTA occupiers in terms of which they were obliged to vacate the land in question. The court found that the settlement agreement, which was negotiated in ignorance of the applicability of ESTA, constituted a waiver by the occupants of their rights in terms of section 9 of ESTA. That is very different from the present matter, in which the magistrate appears to have found that the first respondent waived his rights in terms of ESTA when he signed the agreement facilitated by the CCMA and that that agreement was not made an order of court. Section 8(3) of ESTA⁶ makes it very clear that the termination of employment must be dealt with entirely in terms of the LRA.

[14] The settlement agreements did not regulate the respondents' rights under ESTA, they terminated the employer/employee relationship. This permitted the appellant to terminate the respondents' rights of residence in terms of s 8(2) of ESTA. The Magistrate's finding in paragraph 18 of the judgment that the agreement signed by the first respondent in respect of his termination of employment could not be enforced against him because there is no evidence that his rights were not explained to him, cannot be correct. The CCMA agreement pertained to the labour dispute, not to the right of occupation in terms of ESTA, and the CCMA Commissioner had no obligation to explain to the respondents their rights in terms of ESTA.

[15] The further reason give by the magistrate for his finding in paragraph 18 of the judgment, that the agreement facilitated by the CCMA could not be enforced against the first respondent because it was not made an order of court, is also not correct. In paragraph 8 of the agreement it is stated that the parties consented to the agreement being made an arbitration award in terms of section 142A(1) of the LRA. Section 143 of the LRA provides that an arbitration award issued by a commissioner is final and binding and may be enforced as if it were an order of the Labour Court.⁷

[16] The settlement agreement is accordingly enforceable against the first respondent and it put an end to the dispute about his dismissal. The standard form agreement which was utilized to record the settlement of both the first and second respondents' disputes with the appellant begins with the following paragraph:

The undersigned parties record the settlement of their dispute in the following terms. By signing this agreement the parties acknowledge that the agreement was read to them and interpreted (where necessary) and that they understand the content hereof. This agreement is in full and final settlement of the dispute referred to the CCMA as well as in full settlement of all statutory payments due to the applicant unless specifically excluded in paragraph 4 of this agreement.

[17] The termination of the first respondent's employment by the appellant was accordingly in accordance with the LRA. The next question which arises is whether the first respondent's right of residence arose solely from the employment agreement. This question was not considered by the Magistrate, but must be determined by this court.

Did the respondents' right of residence arise solely from their employment?

[18] It was argued by counsel for the respondents that their right of occupation did not arise solely from their contracts of employment because each of them had signed a separate housing agreement with the appellant and that it is section 8(1) of ESTA which is applicable to the termination of their right of occupation, not section 8(2). Perusal of the employment and housing agreements discloses that, although there are separate agreements, they are interdependent and that while they contemplated the possibility of employment without the provision of housing, it was never contemplated that housing would be provided without the employment contract being intact. The last paragraph of the employment contracts of both the first and second respondent reads as follows:

'24. ACCOMMODATION: The employer, at his discretion, may provide housing at Vredenhof for the employee; the employee agrees that the accommodation forms part of this contract of employment, and that, if this contract of employment is terminated, the employee will vacate the accommodation provided by the employer and leave Vredenhof. The provision of this accommodation is also regulated by the Housing Agreement between the employer as landlord and the employee as tenant.'

Paragraph 3 of the housing agreements of both respondents read as follows:

'The landlord may, at his discretion, provide housing for the tenant while the landlord employs the tenant. If the contract of employment between the landlord as employer and the tenant as employee is terminated, the tenant will vacate the accommodation provided by the landlord on or before the date on which the employment terminates.'

These provisions make clear that the right of residence of both respondents arose solely from their employment agreements, and could be terminated if they were dismissed in accordance with the provisions of the LRA.

Have the requirements of section 9(2) of ESTA been met?

[19] Section 9(2) provides that a court may make an order for eviction if

"(a) the occupier's right of residence has been terminated in terms of section 8;

- (b) the occupier has failed to vacate the land within the period of notice given by the owner or person in charge;
- (c) the conditions for an order of eviction in terms of section 10 or 11 have been complied with;” and
- (d) notice of the intention to obtain an order for eviction has been given as prescribed.

In view of my finding above, section 9(2)(a) has been complied with. It is common cause that Sections 9(2)(b) and 9(2)(d) have also been complied with in that the requisite notices and time frames provided for in those sections were observed. It remains to consider whether there has been compliance with the conditions for an order of eviction in terms of section 10 of ESTA.

Have any of the conditions in terms of section 10 been met?

[20] Section 10(3) of ESTA states as follows:

“(3) If-

- (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
- (b) the owner or person in charge provided the dwelling occupied by the occupier; and
- (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge, a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to-
 - (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and
 - (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.”

[21] I am of the view that all three conditions set out in sub-sections (a), (b) and (c) are present in this case. Suitable alternative accommodation is not available despite the fact that well over nine months has elapsed since the date of termination of the right of residence. It is common cause that the cottage which the respondents occupy was provided by the landowner. Thirdly, the appellant’s founding affidavit alleges that the carrying on of its business will be seriously prejudiced unless the dwelling is available for occupation by another person employed by it and this is not denied.

[22] Having regard to the factors which I must consider in deciding whether it is just and equitable to grant an order of eviction under these conditions, I take the following into account: The appellant has offered to pay for a wendy house or give the respondents a cash amount of R6 000. Secondly, there is a cost to the appellant's business in having the respondents continue to occupy the cottage without any payment being made in respect of rent or services and to the disadvantage of its other staff. On the other hand, the respondents do not have any children or other dependants living with them. They are both able-bodied persons who can seek employment and have had the benefit of being sent on skills courses by the appellant at its expense. The appellant alleges that the first respondent found alternative employment within a short time of being dismissed by the applicant, which the first respondent admits. In these circumstances, the court believes that it is just and equitable to grant the following order:

1. The appeal is upheld.
2. The respondents are ordered to vacate the premises by 15 March 2011.
3. If the respondents fail to vacate the premises by 15 March 2011, the Sheriff is authorized to evict them on or after 17 March 2011.
4. No order is made as to costs.

ACTING JUDGE C E LOOTS

I agree and it is so ordered.

JUDGE Y S MEER

1Act No 62 of 1997

2Act No 66 of 1995.

3Section 9(2)(a) of ESTA.

4Annexure IOM 9 to the founding affidavit

5Annexure IOM 11 to the founding affidavit

6See paragraph [8] above.

7In *Independent Municipal and Allied Workers Union & others v City of Tshwane Metropolitan Municipality and others* (2008) 29 ILJ 171 (LC) paragraph [25] it was held that an arbitration award has the effect of disposing of the matter unless it is rescinded or set aside. See also *Tsotesi v Stallion Security (Pty) Ltd* (2009) 30 ILJ 2802 (LC) paragraph [19]; and *Department of Health v Jones and another* (2009) 30 ILJ 314 (LC) paragraphs [13] – [15].

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