IN THE LAND CLAIMS COURT

(REPUBLIC OF SOUTH AFRICA)

HELD AT CAPE TOWN

Case No: **LCC 09R/2014**

CLANWILLIAM MAGISTRATE'S COURT **CASE NO: 360/2011**

Heard on 30 July 2014
Judgment delivered on 7 October 2014

In the matter between:

JOZIA JOHANNES VAN DER MERWE
(N.O OF THE NOORDHOEK TRUST) First Applicant

JOZIA JOHANNES VAN DER MERWE Second Applicant

and

JAN KLAASE Respondent

In re:

In the matter between

ELSIE KLAASE Applicant

and

JOZIA JOHANNES VAN DER MERWE
(N.O. OF THE NOORDHOEK TRUST) First Respondent

JOZIA JOHANNES VAN DER MERWE Second Respondent

JAN KLAASE Third Respondent

JUDGMENT

CANCA AJ

INTRODUCTION

[1] There are three separate applications for determination in this matter.

[2] Firstly, there is an application for leave to appeal to the Supreme Court of Appeal the whole of my judgment delivered on 28 March 2014 which confirmed, on automatic review, an eviction order granted by the Clanwilliam Magistrate's Court against Jan Klaase, the respondent in the eviction application in the latter Court and the respondent also in this application for leave to appeal the matter under LCC 09R/2014 (the "respondent").

[3] The second application was launched by the wife of the respondent, Elsie Klaase, who seeks the following relief, namely:

3.1 that she be joined as a second respondent in case no. LCC 09R/2014;

3.2 that further proceedings in case no. LCC 09R/2014 including the execution of the eviction order granted against the respondent be suspended pending the determination of her rights in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"); and

3.3 that her application be consolidated with the matter under case no. LCC 09R/2014.

[4] The third application is by Jan Klaase, the respondent, who seeks an order suspending the execution of the eviction order against him pending the determination of his wife, Elsie Klaase's rights under ESTA.

[5] All three applications are opposed. I shall, for the sake of convenience, refer to the parties as they are cited in the application for leave to appeal.

PARTIES

[6] The first applicant, Jozia Johannes Gerhardus van der Merwe, is cited herein in his capacity as a trustee of the Noordhoek Trust (Registration number:IT 3876/95)(the Trust). The Trust is the registered owner of the farm known as Noordhoek, Citrusdal and described as ("GEDEELTE 15" (GEDEELTE VAN GEDEELTE 4) VAN DIE PLAAS MISGUNT NR. 499, AFDEELING CLANWILLIAM, PROVINSIE WES-KAAP), hereinafter referred to as " the farm" or "the property".

[7] The second applicant, Jozia Johannes Gerhardus van der Merwe, leases the farm from the Trust and is in charge of the day-to-day farming operations thereon.

[8] The respondent is Jan Klaase. He has worked on the farm from at least 1972 and qualified as an occupier in his own right when he was allocated premises thereon. Elsie Klaase, hereinafter referred to as Mrs Klaase, is married to the respondent Jan Klaase.

BACKGROUND FACTS

[9] The facts giving rise the various applications are briefly set out hereunder.

[10] The first and second applicants instituted proceedings for the eviction of the respondent, in terms of ESTA, in the Magistrate's Court for the District of Clanwilliam on 4 August 2011. The matter was eventually argued on 9 July 2013 and judgment was handed down on 14 January 2014. In terms of the judgment, the respondent and all persons occupying through him were ordered to vacate the house on the farm by a certain date. Mrs Klaase lives with the respondent on the property together with their children and grandchildren. The eviction order was suspended pending review by this Court.

[11] The eviction order was confirmed by this Court on 28 March 2014 save that the date of the eviction ordered by the Magistrate was amended to a later date.

[12] In April 2014, the respondent lodged an application for leave to appeal to the Supreme Court of Appeal against the entire judgment and order handed down by this Court on 28 March 2014. The judgment was attacked on approximately 14 grounds and these were subsequently supplemented a few days before the hearing with another ground. The application for leave to appeal was then duly set down for hearing on 30 July 2014.

[13] On or about 20 June 2014 Mrs Klaase launched the application set out in paragraph [3] above. Mrs Klaase avers that, because she and the respondent, her three children and two grand- children would be rendered homeless should the eviction order be executed, she has a direct and substantial interest in the relief sought in her application.

[14] The material averments of Mrs Klaase are as follows: she was born on the farm in January 1965, grew up and worked there on a full time basis for a number of years shortly after obtaining a standard 4 educational qualification; she was a general farm labourer who lived on the farm with the second applicant's consent and consequently was an occupier in her own right; her right of occupation was separate from that of the respondent, whom she had married in 1988; she was unaware of her ESTA rights until her attorney, who has represented the respondent since at least 9 July 2013, explained same to her on 17 June 2014. It was therefore not possible for her to have asserted her rights prior to that date, so Mrs Klaase averred.

[15] The first and second applicants oppose the application and premise their opposition on the contention that the Mrs Klaase was never given an independent right to occupy the premises and that she was not born on the property but on a neighbouring farm. The second applicant also contends that Mrs Klaase was never a permanent employee on the farm but rather a seasonal worker who never obtained an independent right of occupation on the property.

APPLICATION FOR JOINDER AND STAY OF PROCEEDINGS

[16] Mr Hathorn, for the respondent and Mrs Klaase, argued that on reading the provisions of ESTA as a whole, justification for granting occupiers security of tenure was that they occupy the land with the consent of the owner. Reliance for this contention was placed on *Mkangeli and Others v Joubert and Others* 2002 (4) SA 36 (SCA) at paragraph 19.

[17] According to Mrs Klaase, she has lived on the property, with the knowledge of the second applicant, for at least thirty years. The presumption set out in section 3(4) of ESTA that "*a person who has continuously and*

openly resided on land for a period of one year or more shall be presumed to have consent unless the contrary is proved" was therefore applicable to her, she contended. In addition, she averred that that presumption placed the onus on the first and second applicants to disprove that she did not have the requisite consent. Mr Hathorn also referred me to the judgment of Wallis JA in *Sterklewies (PTY) LTD t/a Harrismith Feedlot v Msimanga and Others* 2012 (5) SA 392 (SCA) at paragraph 3 as authority for his contention that the law now is that once a person has been shown to occupy land with consent, he or she will ordinarily be an ESTA occupier. The first and second applicants, according to Mr Hathorn, failed to discharge that onus and consequently Mrs Klaase was entitled to the protections afforded to occupiers by ESTA.

[18] Mrs Klaase further contended, amongst others, that she was an employee on the farm for over thirty years and had resided thereon, with the consent of the owner. She was entitled to housing by virtue of a term in her contract of employment and that the premises she was occupying with the respondent, was granted to them jointly, she averred.

[19] The first and the second applicants denied consent was ever given to Mrs Klaase to reside on the farm. According to them, Mrs Klaase's presence on the farm was initially by virtue of her living with her mother and subsequently by virtue of her marriage to the respondent, who had the right to occupy the property as second applicant's full time employee.

[20] Mr Wilkin, for the applicants, argued strongly that Mrs Klaase's alleged rights under ESTA were based on bald and vague allegations. Mr Wilkin further contended that Mrs Klaase had not put up any facts to support her allegation of permanent employment and of consent being actually granted to her to occupy the premises. In the circumstances, because a bald

assertion does not attract an onus to rebut, it was not necessary for the first and second applicants to rebut her allegations, Mr Wilkin argued. He cited *Syntheta (PTY) Ltd (formerly Delta G Scientific (Pty) Ltd) v Janssen Pharmaceutica Nv and Another 1999 (1) SA 85 (SCA)* at 91C as authority in support of this argument.

[21] Mrs Klaase averred that she was born and raised on the property but the second applicant provided evidence that Mrs Klaase was born and raised by her mother on an adjoining farm owned by a third party. The allegation of permanent employment is also not borne by the evidence as Mrs Klaase's salary slips reveal that she was paid on an hourly basis and specifically refer to her as being a temporary worker.

[22] There are different classes of persons who can occupy the property of another in terms of ESTA. Firstly, there are those who are granted consent to occupy the property and thus enjoy protection under ESTA as occupiers[1]. Secondly, in terms of the provisions of section 6(2)(d) of ESTA, there are those persons who, although not occupiers in terms of ESTA, are entitled to reside on the property by virtue of being entitled to family life in accordance with the culture of that family.

[23] The term "occupier" in ESTA is used in a narrow and wide sense. The narrow one being applicable only to persons who have the consent of the owner or person in charge of the property or have another right in law to

[1] "occupier" means a person residing on land which belongs to another person, and who has on or 4 February 1997 or thereafter had consent or another right in law to do so, but excluding –
(a) …….
(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
(c) a person who has an income in excess of the prescribed amount.

reside thereon. The wide sense refers to those who derive their right of residence through or under occupiers in the narrow sense. The persons falling within the latter group are not occupiers in terms of ESTA. It is probably easier to distinguish between the two classes of "occupiers" by using the term "occupiers in their own right" for persons to whom the eviction procedures of ESTA apply, and to the others as "residents". The right of an "occupier in his own right" to stay on a farm derives from consent given by the owner or person in charge of the farm, whilst the right given to a "resident" to stay on the farm derives from a different source, usually a family relationship with an "occupier in his or her own right". See *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) at 425A –B and *Simonsig Landgoed (Edms) Bpk v Vers* 2007 (5) SA 103 (C) at paragraph 18.

[24] In the circumstances, I am persuaded by the argument put up by Mr Wilkin and find that Mrs Klaase is a "resident" and not an "occupier in her own right".

[25] I also find that Mr Hathorn appears to have misconstrued *Sterkliewes* by arguing that a person residing on property with consent *ipso facto* becomes an ESTA occupier. Wallis JA in *Sterkliewes* found that ESTA does not require consent to be an agreement or contract strictly construed. I consequently agree with Mr Wilkin that a person claiming ESTA occupation must be residing on the property without any other right to do so and with the apparent consent of the owner thereof or the person in charge of the land. Mrs Klaase's presence on the property was due, initially, to her living there with her mother and subsequently as a result of her marriage to the respondent. ESTA and the Constitution barred the first and second applicant from denying her access to the property by virtue of the respondent's right to family life.

[26] In the light of all of the above, I find that Mrs Klaase has not made out a case to be joined as the second respondent in Case No LCC09R/2014. I am also of the view that the prospects of another Court finding Mrs Klaase to be an occupier in terms of ESTA are remote. I consequently find that no useful purpose will be served by staying the proceedings in Case No LCC09R/2014.

APPLICATION BY THE RESPONDENT FOR A STAY OF EXECUTION OF THE EVICTION ORDER

[27] I have found that there is no merit in Mrs Klaase's application and therefore the respondent's application for a stay of execution of the eviction order in LCC 09R/2014 also stands to be dismissed.

THE APPLICATION FOR LEAVE TO APPEAL

[28] On 25 July 2014 the respondent filed a notice of an application to supplement his notice for leave to appeal to the Supreme Court of Appeal seeking, *inter alia*, the addition of the following paragraph;

> "*15 The Honourable Court erred in*
>
> *(a) Concluding that the Applicants had complied with the requirements of s 10(1)(c) of ESTA (paragraph 21 of the review judgment) in the light of the grounds relied upon by the Applicant in paragraphs 7.2.1 – 7.2.6 of their founding affidavit; and*
> *(b) Placing the onus on the Respondent to adduce the evidence required to satisfy the "Sterkliewes test" and concluding that the conditions for an order in terms of s 10 of ESTA had been met".*

[29] The application to supplement the notice of appeal was granted and this was the only ground on which the application for leave to appeal was pursued by Mr Hathorn at the hearing.

[30] Subsequent to the hearing of this matter, I caused the Registrar to call on the parties to make written submissions as to whether the application for leave to appeal was directed at the right Court. The relevance of *Kuilders and Others v Pharo's Properties CC & Others* 2001 (2) SA 1180 (LCC) and *Magodi & Others v Janse van Rensburg* [2001] JOL 9145 (LCC) was raised with the parties. The submissions were duly received and I now deal with the crisp question of whether this Court has the power to hear this application.

[31] In *Kuilders*, Judge Gildenhuys found an application for leave to appeal to the Supreme Court of Appeal an eviction order granted by a Magistrate, which he had reviewed, to be defective. The learned Judge stated that appeals from the Magistrate's Court in ESTA matters lie to this Court and not the Supreme Court but left the nature of an eviction order which was reviewed by this Court open.

[32] In *Magodi*, which was handed down after *Kuilders*, Judge Moloto makes it clear that a confirmed order of a Magistrate, following a review process by this Court, remains that Magistrate's order.

[33] An appeal in *Magodi* was subsequently noted in the Magistrate's Court. The appeal was heard by Judges Gildenhuys and Meer in the matter of *Magodi and Others v Van Rensburg* 2002 (2) SA 738 (LCC) where it is stated at paragraphs [5] – [6] that it is this Court that is tasked with the appeal of a Magistrate's decision confirmed on review. See also *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA) at paragraph [5]

[34] Mr Hathorn contends that since his judgment in *Magodi*, Judge Moloto appears to have changed his mind and seems to have been persuaded that an appeal against an ESTA review order lies to the Supreme Court of Appeal. As foundation for this contention, Mr Hathorn referred me to *Land &*

Landbouontwikkelingsbank van Suid-Africa v Conradie [2005] 4 ALL SA 509 (SCA) at paragraph [2]. In this matter, Judge Moloto had set aside, on review, an eviction order granted by a Magistrate and had substituted it with one dismissing the application for eviction. The learned Judge had given leave to appeal to the Supreme Court of Appeal in that matter and this, I assume, forms the basis of Mr Hathorn's contention of Judge Moloto's apparent change of mind.

[35] I cannot agree with Mr Hathorn. The Court, in the second *Magodi* case sitting as a Court of Appeal, confirmed Judge Moloto's finding that an eviction order confirmed on review remained that Magistrate's order. The Court also held that this was the Court with the jurisdiction to hear the appeal against that order. In *Conradie supra* Judge Moloto had overturned the Magistrate's decision and substituted it with his own. He was therefore bound to refer the application for leave to appeal to the Supreme Court of Appeal as his judgment, having overturned the order issued by the Magistrate, became a judgment of this Court.

[36] I consider myself bound by the decision of the full bench in the second *Magodi* matter and *Rashavha* supra.

[37] For the reasons set out of the above, I find that the application for leave to appeal is defective.

[38] Mr Hathorn has, in his written submissions asked, that the respondent be permitted to lodge an appeal to this Court within 30 days of judgment as was the case in *Magodi.* He also asks that the grounds on which leave to appeal is sought be amplified so as to include the issue of appropriate procedures to be followed in applications for leave to appeal from review orders granted in terms of ESTA. This contention, counsel for the respondent, bases on an apparent conflict between the *Magodi* judgments and *Conradie*.

[39] There is, in my view, no conflict between those judgments. *Magodi* dealt with a confirmation of an eviction order whereas *Conradie* concerned a judgment that was overturned on review by this Court.

[40] Regarding the respondent's request that he be permitted to lodge an appeal to this Court *a la Magodi,* I am disinclined to grant the request for the reasons set out hereunder.

[41] Judge Moloto at paragraph [13] of his judgment granted an extension of time to note the appeal because the law on that point was not clear and he was of the opinion that there were prospects of success on appeal.

[42] It is my view that, for the reasons set out in my judgment which confirmed the eviction order, the respondent has no prospects of success on appeal in this matter. Also, the law on this point has been clear since the second *Magodi* matter and *Rashavha*.

COSTS

[43] The first and second applicants asked for a costs order against Mrs Klaase and the respondent. The practice in this Court is not to make costs orders save in instances where there are special circumstances. I have not found any special circumstances in these matters which would justify a departure from the practice of this Court not to award costs.

[44] For the reasons set out above, the following order is hereby made:

1. The application by Mrs Klaase to be joined as the second respondent in Case No LCC 09R/2014 is refused.

2. The application by Mrs Klaase that further proceedings in Case No LCC 09/2014, including the execution of the eviction granted against the respondent be suspended pending the determination of her

rights in terms of the Extension of Security of Tenure Act 62 of 1997 is refused.

3. The application by the respondent for suspension of the execution of the eviction order granted against him in Case No LCC 09/2014, pending the determination of the rights of Mrs Klaase in terms of the Extension of Security of Tenure Act 62 of 1997 is refused.

4. The application by the respondent for leave to appeal to the Supreme Court of Appeal or to this Court is refused.

5. The date on which the respondent and all persons who occupy through him must vacate the premises on the farm, Noordhoek, Citrusdal ("GEDEELTE VAN GEDEELTE 4) VAN DIE PLAAS MISGUNT NR.499, AFDELING CLANWILLIAM, PROVINSIE WES-KAAP) is changed to 14 November 2014.

6. The date on which the eviction order against the respondent may be carried out if the premises have not been vacated, is changed to 17 November 2014.

7. There is no order as to costs.

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Canca AJ
Acting Judge of the Land Claims Court

Appearances:

For the Applicants

Mr L Wilkin

instructed by

Terreblanche Attorneys

For the Respondent and Mrs Elsie Klaase

Mr P R Hathorn

instructed by

J D van der Merwe Attorneys