IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC 6R/2014
MAGISTRATE COURT MODIMOLE CASE NO: 1741/13

In Chambers: CANCA AJ
Decided: 19 March 2014

In the review matter of:

NCHOLO TRUST Applicant

and

JOHANNES MPHOFU 1st Respondent

QUEEN TSHABALALA 2nd Respondent

JUDGMENT

A. **GENERAL BACKGROUND**

1. This is an automatic review of an eviction order by the additional magistrate Modimolle granted, by default, on 14 February 2014. The order evicts the respondents and any of their dependants residing with them on the property described in the Notice of Motion as THE REMAINDER OF THE FARM RHENOSTERPOORT 402 KR, DISTRICT WATERBERG (the Farm). This matter has been referred to this court for review in terms of Section 19(3) of the Extension of Security of Tenure Act, Act 62 of 1997 ("ESTA").

2. This court is unable to confirm the eviction order for the reasons set out below.

3. Although not stated in so many words, it would appear from applicant's founding affidavit that the previous owner of the Farm, the LR Pistorius Family Trust, caused a notice in terms of Section 8(5) of ESTA advising, *inter alia*, that their rights of occupancy would terminate in 12 months time to be served on the respondents[1]. The long-term occupier died on 15 December 2003. These notices were served by the Sheriff for the District of Waterberg on 19 January 2012.

4. Respondents failed to vacate the premises and applicant then launched the application for their eviction apparently on 8 October 2013.

5. The application papers were served by the Sheriff on 1st respondent personally on 11 December 2013 according to his return of service. There is, however, no proof that service was effected on the 2nd respondent.

6. The application was, after a postponement, heard as an unopposed matter, on 14 February 2014, respondents having failed to indicate that they intended to oppose the eviction order sought or to turn up at court, either on the date the matter was originally set down for, or on the day it was eventually heard.

7. The presiding officer, after hearing applicant's attorney on the matter, granted prayers 1, 2, 3 and 4 of the notice of motion but suspended the eviction order pending review thereof by this court.

[1] Section 8(5) of ESTA states that " on death of an occupier[who was a former employee], the right of residence of an occupier who was a dependant may be terminated only on 12 calander months' written notice to leave the land…"

B. **WAS THERE DUE COMPLIANCE WITH CONDITIONS LAID DOWN IN ESTA FOR A LAWFUL EVICTION?**

8. Termination of the right of residence of an occupier is dealt with in Section 8 of ESTA and in particular Section 8(1) thereof which provides that the termination should be "just and equitable" having regard, *inter alia*, to " …. the fairness of the procedure followed by the owner ……. including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence". Section 8(5), which deals with the situation where, as in the present case, the occupier has died, requires the owner or person in charge of the land, to give a spouse or dependants 12 months' notice to leave the land[2].

9. A notice to vacate the land was, as stated in paragraph 3 above, served on the respondents on 19 January 2012. Section 8(5) was therefore, ostensibly complied with.

10. A close examination of the Section 8(5) notices, however, reveals an omission which, particularly when dealing with unsophisticated farm dwellers, raises the question whether there was in fact due notice to the recipients. Section 28(1)(b) of ESTA gives the Minister the power to make regulations regarding the form and manner of service in terms of this Act.

11. The prescribed form and notice to terminate the right of residence and eviction of the spouse or dependants of a deceased occupier in terms of Section 8(5) of ESTA is Form D, published in Regulation R1632 Government

[2] See foot note 1 above

Gazette 1987, 18 December 1998, the salient portions, for purposes of this judgment, are quoted hereunder:

"The summary contained in this notice of your legal position is incomplete. If you want any further information you should immediately contact a lawyer, a non-governmental organisation or the Department of Land Affairs". [now the Department of Rural Development and Land Reform].

[And]

More information

"The Extension of Security Tenure Act gives you the right to live on the land where you were staying on 4 February 1997 or any time thereafter provided you had the permission of the owner or person in charge ……. The Act makes it possible, in certain circumstances, for these rights to be brought to an end. The owner or person in charge must act fairly, and follow the procedures set out in the Act.

In this case, because your right to live on the land was dependant on an aged ……. person who had been living on the land for more than 10 years, the Act gives you special protection. Just because that person has died does not mean that you have to leave the land immediately. The owner or person in charge of the land must first give you at least one year's written notice. When the notice period comes to an end, you may remain on the land until the owner or person in charge gets a court order to evict you. Before this happens, you must be given at least two further month's written notice of the date on which the owner or person in charge intends going to court."

12. This court, per Meer AJ, as she then was, in ABJ Boerdery v Mzamo BJ and Another[3], commenting on the non-service of a Form E notice, which contains wording similar to that quoted above said, *inter alia*:

> "The Form E notice to an occupier informing him/her of the intention to obtain an eviction order is a complicated document at the best of times. Given that many occupiers are unsophisticated, it is crucial that the regulations, which are designed to make important information contained in the document as accessible as possible, are complied with".

13. I respectfully agree with the sentiments expressed by Judge Meer. See also Landbounavorsingsraad v Klaasen[4], the comments of Gildenhuys AJ, as he then was, although he found the note at the beginning of Form E *ultra vires* the enabling legislation and invalid, [Form D has a similar note].

14. The Section 8(5) notice served on the respondents did not contain the paragraphs of Form D quoted above. The right to housing and the prohibition of arbitrary eviction therefrom are fundamental rights enshrined in the Constitution of the Republic of South Africa[5]. The occupier facing a potential eviction is therefore entitled to all the information he or she might require to protect his or her fundamental right, which information must be provided in a fair and reasonable manner, ensuring that such information is fully understood. This must have been the intention of the Legislature in crafting the Form D notice in the empowering manner in which it did.

[3] LCC 46R/01 at paras 6 & 8
[4] 2005(3) SA 410 at 426 and 427 at para [38]
[5] Government of the Republic of South Africa and Others v Grootboom and Others 2001(1) SA 46 at 66 E – H & 67 A- G

15. ESTA demands fairness and equity in all dealings with a potential evictee. The Form D notice therefore merely spells out explicitly what is implicitly demanded by the statute should be told to a person who faces the loss of her or his home.

16. Section 9 of ESTA decrees compliance with express conditions that have to be complied with before an occupier may be lawfully evicted. In this regard see sub-sections 9(2) of ESTA and the dicta of Dodson J in Badiri Housing Association v Ramavhoya & Others 2000 (3) All SA 463 LCC at paragraph 8, where he states, inter alia, that the failure by an applicant to fully comply with section 9(2) will result in the denial of the eviction order sought.

17. Applicant's case is that respondents have not vacated the land despite being given notice in terms of Section 8(5) while having had sufficient time to seek alternative accommodation. Consequently their eviction was just and equitable. As I have pointed out earlier, the notice given was defective and therefore, there was no proper compliance with Section 8(5).

18. Section 9(2)(d) of ESTA, in addition to requiring the service of the Section 8(5) notice, demands of the owner or person in charge of the land to ensure that, after termination of the right of residence, at least two month's written notice signalling his intention to obtain an order for eviction is given to: -

    (i) "The occupier;

    (ii) The municipality in whose area of jurisdiction the land in question is situated (in casu, Waterberg); and

(iii) The head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes ……"[6]

There is nothing in the file before this court that proves that service of the application papers were served on the 2nd respondent, the municipality of the district of Waterberg or on the provincial office of the Department of Rural Development and Land Reform (the Department).

19. Rather, applicant, at paragraph 4.7 and 4.8 of its founding affidavit states that:

"I am advised that after termination and before finalisation of this application, that I am required to give notice to the respondents, as well as the local municipality in the area of jurisdiction, as well as the provincial office of the Department of Land Affairs for information purposes. I will see to it that not less than two months written notice of the intention to obtain an order for eviction shall be served on the parties prior to the application being placed before the Honourable Court, and do beg leave to supplement this application with an affidavit confirming that we have complied with the said provisions."

20. There is no evidence that there was service of the papers on the municipality or the Department. Furthermore, applicant does not, according to the file before this Court, appear to have deposed to an affidavit advising or confirming that it had complied with the requirements of service on the entities referred to in Sections 9(2)(d)(ii) and (iii)[7], as it had undertaken to do in its founding affidavit.

[6] Section 9(2)(b) of ESTA

[7] According to Section 9(2)(d), the owner or person in charge must give, *inter alia*, the municipality in whose area of jurisdiction the land is situated at the head of the relevant provincial office of the Department, not less than two calendar months' notice of the intention to obtain an order for eviction, containing the prescribed particulars and setting out the grounds on which the eviction is based.

21. Compliance with the provisions of sub-sections 9(2)(d)(ii) and 9(2)(d)(iii) regarding service on the municipality and the Department is peremptory. Service on these entities is mandatory because a municipality may have to advise, when called on to do so, whether or not it has suitable alternative accommodation available to house the evictee or evictees and the relevant Department is, by service of the papers on it, made aware of the situation and hopefully, is spurred on to assist the evictees in defending their constitutionally protected human rights. In this regard, see the quotation from City Council of Springs v Occupants of the Kwa – Thema Farm case cited by Dodson J on page 463 in Badiri Housing Association referred to above.

    Applicant's apparent failure to effect service of the application papers on the municipality and the Department renders the eviction order a nullity[8]

22. Applicant has failed to comply with all the requirements imposed by ESTA and therefore its application for an eviction order cannot succeed.

C. **GENERAL COMMENTS**

23. I have, in paragraph 3, already mentioned that there is no proof that the application papers were served on 2nd respondent. This omission, by itself, ought to have led the court *a quo* to refuse to grant an eviction order against her.

[8] See Wichmann No and Another v Langa and Others 2006(1) SA 102 at para 44 and the cases mentioned there.

24. Anna Tshabalala, according to the founding affidavit, passed away on 15 December 2003 and, in terms of an agreement allegedly entered into between her and the previous owner, her siblings were allowed to stay on the farm until her death. It could , therefore , be argued that the previous owner tacitly consented, until January 2012 when the eviction notice was sent, at the very least, to 2nd respondent, who is said to be a sibling of Anna Tshabalala, staying on the farm in her own right, thereby bringing her within the ambit of Section 11 and not Section 10 of ESTA.

25. In his Reasons for Order, the presiding officer states, *inter alia*, that all the prerequisites as set out in Section 9(2) were met by the applicant and "it is evident from the contents of the documents that the respondents did not occupy the property prior to 4 February 1997. Thus the conditions for an order for eviction in terms of Section 11 of Act 62 of 1997 have to be complied with". He then goes on to say that "after having regard to the provisions as set out in Section 10(3) of the Act, the court is satisfied that it is just and equitable to grant the order of eviction".

26. As stated above, it does not appear from the papers before this court that the provisions of Section 9(2) have in fact been complied with. Also, the presiding officer appears to have misdirected himself in that, whilst stating that the provisions of Section 11 of the Act have to be complied with, he had regard to the provisions of Section 10(3) in satisfying himself as to whether or not the eviction was just and equitable. Sections 10 and 11 refer to two different and distinct scenarios, namely occupation pre and post 4 February 1997. Also, there is no evidence in the founding affidavit dealing with the requirements set out in Section 10(3)(c) (i) and (ii).

27. I am therefore not convinced that applicant has placed any evidence before the court *a quo* which would have enabled the presiding officer to reach the conclusion that it was just and equitable to grant the eviction order.

28. Presiding officers have a duty to be extra vigilant when dealing with unopposed matters affecting constitutionally protected rights such as the right to housing, particularly those of indigent people. A bold statement in the Reasons for Order stating that "the court is satisfied that it is just and equitable to grant the order for eviction", without giving reasons how that determination is arrived at, especially when it is also not backed up by facts in the papers, will neither be sufficient to meet the just and equitable criteria of ESTA, nor will it meet those set out in various Constitutional Court judgments dealing with evictions. In this regard see Port Elizabeth Municipality v Various Occupiers 2005(1) SA 217 at 236 & 237 where Sachs J, in interpreting The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) , laid down the following principles when analysing the phrase "just and equitable":

> "the phrase "just and equitable" makes it plain that the criteria to be applied are not purely of a technical kind that flow ordinarily from the provisions of land law. The emphasis on justice and equity underline the central philosophical and strategic objective of PIE. Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complementary and mutally reinforcing. The necessary reconciliation can only be attempted by close analysis of the actual specifics of each case. The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable

principles of an ongoing stressful and law governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedure it may adopt, the way in which it exercises its powers and the orders it makes. The Constitution and PIE require that in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupiers and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result".

29. Although the abovementioned case dealt with PIE, the test set out therein has been held by this court to be applicable in ESTA matters as constitutionally protected housing rights are at issue in both instances. See Herman Diedericks v Univeg Operations South (Pty) Ltd T/A Heldervue Estates LCC18/2011.

D. **CONCLUSION**

30. In summary:

30.1 The notices issued in terms of Section 8(5) of ESTA did not comply with Form D published in Regulation R1632 of Government Gazette 1987, 18 December 1998, rendering them invalid;

30.2 Applicant, on the papers before me, has not proved that there was service of the application papers on 2nd respondent, the municipality for the district of Waterberg and on the head of the

provincial office of the Department, nor that such service was effected two calendar months before the launch of the application for the eviction order;

30.3 The second respondent may in any event fall within the ambit of Section 11 of ESTA and no longer of Section 8(5) of that Act; and

30.4 There was no sufficient evidence in the papers to justify the presiding officer coming to the conclusion that it was just and equitable in the circumstances to grant the eviction order.

31. In the result, the following order is made: -

a) The order for the eviction of the respondents is set aside. The applicantis granted leave to approach the Court for a further order should it so wish, on the same papers supplemented where necessary.

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CANCA AJ

Land Claims Court