



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 733/07

In the matter between:

LEBOWA PLATINUM MINES LTD

First Appellant

and

GERHARD VILJOEN

Respondent

Neutral citation: *Lebowa Platinum Mines Ltd v Viljoen* (733/2007)[2008]
ZASCA 163 (01 December 2008)

CORAM: FARLAM, CAMERON, JAFTA, MAYA JJA et MHLANTLA
AJA

HEARD: 17 December 2008

DELIVERED: 01 December 2008

Summary: Extension of Security Tenure Act 62 of 1997 – meaning of ‘occupier’.

ORDER

On appeal from: Land Claims Court (Bam JP)

The appeal is dismissed with costs.

JUDGMENT

MAYA JA: (Farlam, Cameron, Jafta JJA and Mhlantla AJA concurring):

[1] This appeal concerns the meaning to be ascribed to the term ‘occupier’ as defined in the Extension of Security of Tenure Act 62 of 1997 (ESTA).

[2] The appellant is a registered mining company carrying on business in the platinum mining industry. It has permission to use the surface of certain land situate on the farm Zeekoegat No 421 KS in the Northern Province district of Lydenburg for residential purposes in terms of a permit issued to it by the Department of Minerals and Energy. The appellant has built approximately 160 residential houses on the land which it uses to attract qualified staff by accommodating them for a nominal rental.

[3] On 3 August 2004, the respondent commenced employment with the appellant as its Operations Supervisor for a gross monthly wage of R11 438. In keeping with its housing policy, the appellant allocated him a family home for a nominal monthly rental of R23 and a monthly contribution of R150 towards water and electricity charges.

[4] The employment relationship however soon soured. On 23 May 2006 the respondent was charged with dishonesty, the details of which need not occupy us for present purposes. Disciplinary proceedings were instituted against him and on 22 June 2006 he was found guilty and dismissed. Thereafter, he referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) contesting his dismissal. He was unsuccessful. He then launched review proceedings in the Labour Court against the CCMA decision. Those proceedings are pending. He and his family remain in occupation of the premises despite the appellant's attempts to evict him following his dismissal.

[5] In terms of the appellant's housing policy 'an employee who is dismissed from [its] service will be allowed 30 days in which to vacate the [company] house' after the date of such dismissal. In January 2007, consequent on the respondent's refusal to vacate the premises after the expiry of the 30 day period, the appellant instituted proceedings in the Pretoria High Court for his eviction in terms of s 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). This was on the basis that the respondent was an 'unlawful occupier'

as defined in PIE¹ as he no longer had the express or tacit consent of the appellant to occupy the premises. The respondent opposed the proceedings and raised the defence that he was an ‘occupier’ as contemplated in ESTA because he was unemployed and the premises are situated on a farm and not in a township as envisaged in s 2 of ESTA.² These facts, he contended, excluded the high court’s jurisdiction to adjudicate the eviction proceedings which were, in any event, premature as his right to occupy could be terminated in terms of s 8(2) and (3) of ESTA only upon final determination of his labour dispute.³

[6] The appellant agreed to have the matter transferred to the Land Claims Court in terms of s 20(3) of ESTA⁴ and tendered to pay the wasted costs. As it appears in the judgment of the court below (Bam JP), ‘the [appellant’s] submission [on which its case was premised] that the respondent’s right to reside on the premises automatically terminated upon dismissal [on 22 June 2006] was not pursued’. The court below opined that such argument had no merit in any event as s 3(1) of ESTA stipulates that consent to an occupier may be terminated only in accordance with the provisions of section 8. The court below considered the respondent’s defence that when the eviction proceedings were launched he was not earning any income and, relying on its judgment in *Hallé v Downs*,⁵ more of

¹ In s 1 of PIE an ‘unlawful occupier’ is defined as ‘a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of [ESTA], and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).’

² In terms of the provisions of this section, ESTA ‘shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law...’

³ The provisions of s 8(2) and (3) of ESTA are set out in para 11 below.

⁴ Section 20(3) of the ESTA provides: ‘If in any proceedings in a High Court at the date of the commencement of this Act that Court is required to interpret this Act, that Court shall stop the proceedings if no oral evidence has been led and refer the matter to the Land Claims Court.’

⁵ 2001 (4) SA 913 (LCC).

which later, the court held that the respondent fulfilled the requirements of an ‘occupier’ in terms of ESTA when the application was instituted. The court then concluded that the appellant should have instituted the eviction proceedings in either the magistrate’s court or the Land Claims Court under ESTA and dismissed the application with costs. It is this decision that the appellant seeks to have overturned, with the leave of the court below. The issue, therefore, is the applicability of the provisions of ESTA.

[7] The appellant’s case before us turned on the contention that the respondent’s right to occupy the premises arose solely from his contract of employment, was dependent and conditional upon his continued employment and terminated automatically on his dismissal. It was submitted on its behalf that ESTA seeks to redress the unfair eviction from land of poor farm workers resulting from past discriminatory laws and practices and that s 8(2), in particular, was not intended to protect a person in the respondent’s position ie an employee of an owner of land earning an income in excess of the minimum R5 000 cash wage or salary prescribed in the ESTA regulations, whose occupation of the land is a condition of employment and whose consent to occupy the land is subject to his continued employment with the owner.

[8] Conceding that the respondent’s right of residence arose solely from his employment contract, *amicus curiae* Mr Zietsman, to whom this court is indebted for his able assistance, contended that although such contract terminated on 22 June 2006, the appellant consented to the respondent’s continued occupation of the premises for a further 30 days ie until 23 July 2006 and that this coupled with the fact that he did not earn an income on

the latter date brought him within the definition of ‘occupier’ under ESTA. It was alternatively submitted that, in any event, subsections 8(2) and (3) of ESTA entitle the respondent to occupy the premises until his pending labour dispute in terms of the Labour Relations Act⁶ has been resolved.

[9] ESTA has its origins, *inter alia*, in s 25(6) of the Constitution which entitles ‘[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices ... to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress’. As appears from its preamble,⁷ the main purpose of ESTA is to regulate the eviction process of vulnerable occupiers of land and it generally seeks to protect a designated class of poor tenants occupying rural and peri-urban land (s 2(1))⁸ with the express or tacit consent of the owner against unfair eviction from such land.

[10] The term ‘occupier’ is defined as follows in s 1:

⁶ Act 66 of 1995.

⁷ It reads:

‘To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters concerned therewith.

WHEREAS many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction;

WHEREAS unfair evictions lead to great hardships, conflict and social instability;

WHEREAS this situation is in part the result of past discriminatory laws and practices;

AND WHEREAS it is desirable that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies; that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners; that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances; to ensure that occupiers are not further prejudiced’.

⁸ In terms of s 2(1) of ESTA ‘all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, falls within its ambit.

‘a person residing on land which belongs to another person and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding –

- (a) ... (deleted by s 6(a) of Act 51 of 2001.)
- (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.’

The ‘prescribed amount’ referred to in (c) is stipulated in s 2 of the ESTA regulations⁹ as a gross monthly cash wage or salary in the sum of R5 000.

[11] According to s 3(1), consent to an ‘occupier’ to reside on or use land shall only be terminated in accordance with the provisions of s 8. The relevant provisions in s 8 are set out in subsections (2) and (3) which read:

‘(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 [66 of 1995].

(3) 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

⁹ The regulations were promulgated in terms of s 28(1) of ESTA and published in Government Notice R1632 GG 19587 dated 18 December 1998. Section 2 thereof reads:

‘Qualifying income

(1) The prescribed amount for the purposes of paragraph (c) of the definition of “occupier” in section 1(1) of the Act shall be an income of R5 000 per month.

(2) For the purposes of subregulation (1) “income” means –

(a) a person’s gross monthly cash wage or salary; or

(b) where a person earns money –

(i) other than in the form of a monthly cash wage or salary, the average monthly amount of such person’s gross earnings during the immediately preceding year; or

(ii) in addition to a monthly cash wage or salary, such person’s gross monthly cash wage or salary together with the average monthly amount of such person’s additional gross earnings during the immediately preceding year:

Provided that remuneration in kind shall not be taken into account.’

Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.’

[12] Turning to the facts of the present case, I deal first with the proposition on the appellant’s behalf that only ‘poor previously disenfranchised farm workers’, which the respondent undisputedly is not, may benefit from the protection offered by ESTA. I have some difficulty with this submission. In *Mkangeli v Joubert*¹⁰ Brand JA said:

‘Generally speaking ESTA protects a particular class of impecunious tenant on rural and semi-rural land against eviction from that land ... It seems ... that ... the Legislature intended to impose extensive limitations on any right to seek the occupiers’ eviction from that land. This intention appears to be emphasised by the plain wording of ss 9(1) and 23(1) of ESTA [which prescribe that an occupier may be evicted only on the authority of a court order] ... A literal interpretation of these provisions appears to indicate an intention on the part of the Legislature that any right to have an occupier evicted, *regardless of who may be the holder of such right and whatever the source of such right may be*, should be subject to and limited by the provisions of ESTA.’¹¹

(Emphasis added.)

[13] These views, with which I respectfully agree, tend to reinforce mine – that although there is obviously a particular class of vulnerable persons who were the legislature’s primary concern when ESTA was conceived, of which the respondent may not be a member, courts are nonetheless enjoined to consider the colour-blind provisions of s 26(3) of the Constitution¹² when interpreting ESTA. From the wide wording of such provisions, it hardly

¹⁰ 2002 (4) SA 36 (SCA).

¹¹ *Mkangeli v Joubert* 2002 (4) SA 36 (SCA) at paras 9, 17 and 18.

¹² In terms of the provisions of this section ‘[no] one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances [and] no legislation may permit arbitrary evictions.’

seems inconceivable that in that exercise a person falling outside the designated category, but nonetheless possessed of a land owner's consent or some other legal right, may fall within its purview. In the words of Harms JA, dealing with the scope of PIE, in *Ndlovu v Ngcobo*¹³ '[t]he Bill of Rights and social or remedial legislation often confer benefits on persons for whom they are not primarily intended ...[t]he law of unintended consequences sometimes takes its toll'.

[14] That said, my view is that in considering the meaning of the term 'occupier' under ESTA, the starting point must be when the circumstances of the person sought to be evicted ought to be considered to ascertain whether or not he or she is such an 'occupier'. This exercise was conducted in the *Hallé* judgment mentioned above. There, the court decided that '[t]hat would usually be the time when legal proceedings for ... eviction are commenced, but ... may even be later, should circumstances change during the course of the litigation'.¹⁴

[15] Rejecting the *Hallé* ratio, appellant's counsel urged upon us that on a literal reading of the definition of 'occupier' particularly the legislature's change in tense in the wording 'a person residing on land ... who has on 4 February 1997 or *thereafter had consent*', the date of termination of the respondent's employment contract should decide the question. He argued that to do otherwise would be unreasonable as it would confer on the respondent a status he did not enjoy during the whole of his tenure of

¹³ 2003 (1) SA 113 (SCA).

¹⁴ At para 13.

employment merely on the basis of the 30 day grace period which was only intended to allow him a decent exit from the premises.

[16] Contrary to the submissions on the appellant's behalf, I do not find that the interpretation of the relevant provisions of ESTA suggested on the respondent's behalf would yield absurd or unreasonable results. As I understand it, on the literal approach contended for on the appellant's behalf, all that ESTA requires for a tenant to qualify as an 'occupier' is the owner's consent or 'another right in law' to reside on the land as long as he or she does not use the land in the manner excluded in (b) of the definition or earn more than R5 000 a month.

[17] As to when the tenant is required to possess these attributes, bearing in mind that it is not so far-fetched a possibility for a tenant's circumstances to change for any number of reasons, for better or worse, during the period of his or her occupation and impact on the nature of such occupation, the relevant time on the plain meaning of the provisions must be when lawful occupation ceases ie when the permission or right to occupy is withdrawn or ceases (or, if coincident, when the eviction proceedings are instituted).

[18] It is so in this case that the respondent did not qualify as an 'occupier' during the tenure of his employment. It is however a fact that cannot simply be ignored that he remained in occupation of the premises with the appellant's consent after termination of such employment; this at a time when he no longer earned an income and did not use the premises for the purposes precluded in the ESTA definition. During this period, the respondent's occupation of the premises undoubtedly assumed an entirely

different character which, in my view, brought him squarely within the ambit of ‘occupier’. I can conceive of no reason why the fact that he previously occupied the premises in a different capacity should exclude him from a definition whose requirements he clearly satisfied when his permission to remain on the premises came to an end.¹⁵ The 30-day ‘goodwill provision’ in the appellant’s own housing policy is its undoing and is fatal to its case.

[19] In my judgment, the respondent is an ‘occupier’ as contemplated in ESTA. The appeal must, therefore, fail and the appellant must pursue whatever rights it may have against the respondent in accordance with the provisions of ESTA. This finding disposes of the issue and dispenses with the need to consider the alternative arguments. It follows that the *Hallé* decision is incorrect in so far as it extends the time relevant to consider a tenant’s circumstances beyond the date on which consent terminates.

[20] For these reasons, the appeal is dismissed with costs.

MML MAYA
JUDGE OF APPEAL

APPEARANCES:

¹⁵ Compare *Simonsig Landgoed (Edms) Bpk v Vers and others* 2007 (5) SA 103 (C) at para 27.

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