



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

19 December 2023

SIGNATURE

DATE:

CASE NO: LCC23R/2023

Magistrate's Court Case Number: 832/2019

In chambers before Cowen J
In the matter between:

CROOKES BROTHERS LIMITED

(REG: 1913/000290/06)

First Applicant

CROOKES BROTHERS SOUTH AFRICA (PTY) LTD

(REG: 2007/020767/07)

Second Applicant

and

THABO MAKHATHA

(ID: [REDACTED])

First Respondent

**MISS NONTOMBI
(ID: UNKNOWN)**

Second Respondent

**AND ALL OTHER PERSONS WHO RECEIVED
OCCUPATION FROM THE FIRST RESPONDENT**

Third Respondent

JUDGMENT

COWEN J

1. This is an automatic review of an eviction order granted by the Magistrate of Caledon on 15 June 2022. The eviction application was instituted by the applicants, Crookes Brothers Limited and Crookes Brothers South Africa (Pty) Ltd in November 2019. The respondents are Mr Thabo Makhatha and Ms Ntombi and those occupying through them, being two minor children. The Magistrate granted an eviction order authorizing the respondents' eviction in December 2022 from the first applicant's property, being the Remainder of Portion 3 of the Farm Ou Werf No 21 (the property).

2. The review is before this Court in terms of section 19(3) of the Extension of Security of Tenure Act 62 of 1997 (ESTA).¹ For reasons unknown, the review only reached

¹ Section 19(3) provides: Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the *Gazette*, shall be subject to automatic review by the Land Claims Court, which may:

- (a) Confirm such order in whole or in part;
- (b) Set aside such order in whole or in part;
- (c) Substitute such order in whole or in part; or
- (d) Remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit.

this Court in mid-August 2023 but the record was incomplete. A complete record was only secured thereafter, following a query by this Court.

3. The Magistrate granted the eviction order in circumstances where the application was effectively unopposed. Although the first respondent initially sought to oppose the application and it was postponed on more than one occasion to enable him to obtain legal representation, he ultimately did not deliver any opposing papers and did not appear on the final hearing date. The second respondent at no stage appeared at Court. Nevertheless, the Court was apprised of certain information germane to the respondents' position from the probation officer's report supplied in terms of section 9(3) of ESTA.²
4. The eviction order was granted in circumstances where the first respondent's right to reside on the property, where he has lived since 2000, was linked to his employment, which had been terminated. It was terminated in March 2014, by dismissal for misconduct, relating to his sale of alcohol from the property. Although the first respondent referred to matter to the CCMA, his notice of referral was defective and his application for condonation to remedy the defect was unsuccessful. He did not further prosecute the matter. The applicants understandably required the premises occupied for its employees. However, according to the probation officer's report, dated November 2019, the first respondent was then unemployed.
5. According to the applicants, the second respondent's right to reside was dependent on that of the first respondent with whom she lives. She at no stage worked for the

² See *Drakenstein Municipality v CJ Cilliers En Seun (Pty) Ltd & Others* [2016] ZALCC 9, para 15, where this Court considers the purposes and importance of these reports.

applicants, and works on a neighbouring farm. According to the probation officer's report, the second respondent started residing on the property in 2013.

6. According to the probation officer's report, the first and second respondent have two minor children. They have a daughter who was then aged thirteen and a son, then only one year of age.
7. An eviction order may only be granted in terms of ESTA if the requirements of section 9 are complied with.³ I am unable to confirm the eviction order for two reasons.
8. The first is that on the information before the Magistrate provided by the probation officer, which could not be ignored, the second respondent was an occupier in her own right when the applicants sought to terminate her residence only on 24 May 2017. She had resided on the property since 2013, and had done so openly.⁴ The

³ 9. Limitation on eviction

(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(2) A court may make an order for the eviction of an occupier if-

- (a) the occupier's right of residence has been terminated in terms of section 8;
- (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
- (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
- (d) the owner or person in charge has, after the termination of the right of residence, given-
 - (i) the occupier;
 - (ii) the municipality in whose area of jurisdiction the land in question is situated; and
 - (iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes,

not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.

(3) For the purposes of subsection (2) (c), the Court must request a probation officer contemplated in section 1 of the Probation Services Act, 1991 (Act 116 of 1991), or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period-

- (a) on the availability of suitable alternative accommodation to the occupier;
- (b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;
- (c) pointing out any undue hardships which an eviction would cause the occupier; and
- (d) on any other matter as may be prescribed.

⁴ The applicants, somewhat opaquely, did not refer to the date of original occupation, but the probation officer did, and the applicants did not seek to refute this information or deal with it in any way.

protections of section 3(4) and 3(5) of ESTA accordingly apply.⁵ In those circumstances, the conclusion could not be reached that her rights had been terminated in accordance with section 8 of ESTA.⁶ This is because the applicants gave her a notice to vacate without any hearing⁷ and without considering her status as an occupier.

⁵ Section 3(4) of ESTA provides: 'For the purposes of this Act, consent to a person to reside on land shall be effective regardless of whether the occupier, owner or person in charge has to obtain some other official authority required by law for such residence.' Section 3(5) provides: 'For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge.' See *Klaase and Another v van der Merwe N.O. and Others* [2016] ZACC 17; 2016 (9) BCLR 1187 (CC); 2016 (6) SA 131 (CC).

⁶ 8. Termination of right of residence

(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-

- (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
- (b) the conduct of the parties giving rise to the termination;
- (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
- (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
- (e) the fairness of the procedure followed by the owner or person in charge, 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.

(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.

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

(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-

- (a) has reached the age of 60 years; or
- (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,

may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.

(5) On the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10 (1).

(6) Any termination of the right of residence of an occupier to prevent the occupier from acquiring rights in terms of this section, shall be void.

(7) If an occupier's right to residence has been terminated in terms of this section, or the occupier is a person who has a right of residence in terms of subsection (5)-

- (a) the occupier and the owner or person in charge may agree that the terms and conditions under which the occupier resided on the land prior to such termination shall apply to any period between the date of termination and the date of the eviction of the occupier; or
- (b) the owner or person in charge may institute proceedings in a court for a determination of reasonable terms and conditions of further residence, having regard to the income of all the occupiers in the household.

⁷ See section 8(1)(e) and *Snyders and Others v De Jager and Others (Appeal)* [2016] ZACC 55; 2017 (5) BCLR 614 (CC); 2017 (3) SA 545 (CC).

9. The second reason concerns the duty on the Court to consider whether there is suitable alternative accommodation available to the respondents, in terms of section 11(3)(c) and whether an eviction might lead to homelessness. These considerations are highly material to ensuring that the interests of landowners and occupiers are duly balanced as mandated by ESTA.⁸ In this regard, the probation officer drew attention to the fact that in circumstances where the first respondent was unemployed he may well not have suitable alternative accommodation. The probation officer, while apparently accepting of the applicants' need to have access to the accommodation for other employees, specifically recommended that the Court involve the Theewaterskloof Municipality to ascertain if there is temporary shelter available for the respondents. There is no suggestion that the Court considered this and no report was procured from the Municipality. On the facts of this case, I am of the view that the Court erred in failing to consider this recommendation and to request a report from the Municipality because, without it, the Court was disabled from duly assessing the impact of the eviction on the family, including whether they could be accommodated in temporary emergency accommodation. The impact extends not only to the adult members of the family but potentially to their children one of whom was at school going age.⁹ Notably, moreover, the Magistrate concluded on the facts that the first respondent had rented accommodation in nearby Worcester, relying on the probation officer's report. However, that information does not appear on the record. The only suggestion made is made by the applicants, in general terms, that one can access rental accommodation nearby. In these circumstances, I am of the view that the

⁸ *Molusi and Others v Voges NO and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016(7) BCLR 839 (CC).

⁹ In this regard, the Magistrate had regard to the fact that the first respondent had informed the Court during an earlier appearance that the elder child was in the Eastern Cape. The probation officer records, however, that the child is at school close to the property.

lower Court did not duly to consider the requirements of section 11(3)(c) or whether the eviction might result in homelessness. Moreover, on the facts of the case, the Municipality ought to have been requested to deliver a report to the Court, as recommended by the probation officer.¹⁰

10. In the circumstances, the appropriate order is to set aside the order of the Magistrate and to remit the application to the Magistrate Court. I also substitute the Magistrate's order with an order granting the applicants leave to supplement their founding affidavit in respect of the second respondent (and those occupying through her) to address the issues raised in paragraph 8 of this judgment in paragraph if and when they are able to. Should they do so, and given the lapse of time, an updated probation officer's report and a report from the Municipality would need to be obtained. As regards the first respondent, I issue a direction that the Municipality deliver a report to address the concerns raised in paragraph 9. Given that the respondents comprise a family unit, I make no further direction regarding the further conduct of the matter which should be left to the parties and the Magistrate.

11. The following order is made:

11.1. The order of the Magistrate of Caledon of 15 June 2022 is set aside and the application is remitted to the Magistrate's Court.

11.2. The order of the Magistrate is substituted with the following order:

¹⁰ *Drakenstein Municipality v Hendricks and Others* [2009] ZAWCHC 228 at para 32. The decision deals with an eviction in terms of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, but is apposite in context of ESTA too in circumstances where a Municipality must be given notice of eviction applications.

- '1. The Applicants are granted leave to supplement their founding affidavit.
2. The Registrar of the Magistrates Court is directed to request the Theewaterskloof Municipality to deliver a report to address the concerns raised in paragraph 9 of the judgment.



S J COWEN
Judge
Land Claims Court