REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 421/02

In the matter between:

JOHANNES MPEDI 1st Appellant
REBECCA MPEDI 2nd Appellant
JOHANNA MPEDI 3rd Appellant
DAVID MPEDI 4th Appellant
PHILEMON MPEDI 5th Appellant

and

ERASMUS ALBERTUS SWANEVELDER 1st Respondent
JOHANNA CORNELIA SWANEVELDER 2nd Respondent

CORAM: **MPATI DP, STREICHER, NAVSA, HEHER JJA and MOTATA AJA**

HEARD: **17 NOVEMBER 2003**

DELIVERED: **28 NOVEMBER 2003**

Summary: Extension of Security of Tenure Act 62 of 1997 – termination of right of residence – procedure for eviction order.

JUDGMENT

MPATI DP:

[1] The first and second appellants are husband and wife and reside on the farm Rietgat 8 in the Vaalwater District, Northern Province, together with the

third, fourth and fifth appellants, who are their children. The respondents are married to each other in community of property and are the owners of the farm (Rietgat). They also own an adjoining farm, Steenbokfontein, on which they reside.

[2] The first appellant was employed by the first respondent as a farm labourer and was an occupier on Rietgat as defined in the Extension of Security of Tenure Act 62 of 1997 (ESTA). During 1999 relations between the first appellant and the first respondent became strained, which resulted in the first appellant's employment being terminated on 21 April 1999 following a disciplinary hearing in which he was charged with having absconded from duty. After various attempts to challenge it, the first appellant's dismissal was finally 'confirmed' when an arbitrator appointed by the Commission for Conciliation, Mediation and Arbitration dismissed the arbitration proceedings due to the failure of the first appellant and his legal representative to attend. The fairness or otherwise of the dismissal is accordingly not in issue in this appeal.

[3] In March 2001 the respondents applied on motion to the Land Claims Court for orders of eviction against the appellants. The proceedings were opposed. The parties agreed that certain factual disputes be referred for oral evidence. After hearing evidence Gildenhuys AJ, in an extensive judgment, granted the eviction orders and made no order as to costs. The appellants now appeal against the eviction orders with leave of the court below. The respondents do not oppose the appeal and abide the decision

of this Court.

[4] The issues in this appeal are the following:

(a) Whether the first appellant's right of residence arose solely from his employment contract.

(b) Whether the second appellant was an occupier in her own right.

(c) Whether the first appellant had committed such a fundamental breach of the relationship between him and the respondents that it was not possible to remedy it (s 10(1)(c) of ESTA).

(d) The ages of the first and second appellants.

I propose to dispose of the last-mentioned issue first.

[5] Section 8(4) of ESTA provides that 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 has reached the age of 60 years may not be terminated unless that occupier has committed a breach contemplated in s 10(1)(a), (b) or (c). For an occupier to bring himself/herself within the provisions of this subsection he/she must prove residence on the land for 10 years and that he/she has reached the age of 60 years. Mr Mokhari, who, together with Ms Pillay appeared for the appellants, conceded that the date of birth or age of a person reflected on his/her identity document is not sufficient proof of the age of such person. According to his identity document, the first appellant was 57 years old at the time of the termination of his right of residence on Rietgat while the second appellant's age was reflected on her identity document as 65 years. Both appellants do not know their dates of birth. The witnesses called on their behalf to support their allegations that they were both over the age of 60 years could also not testify as to the dates of birth of the first and second appellants or provide evidence from which their ages could reliably be inferred. There was accordingly no acceptable or reliable evidence placed before the trial court regarding the ages of the first and second appellants, and that being the case, Mr Mokhari conceded that they failed to prove that they had reached the age of 60 years at the relevant time.

[6] I proceed to consider the first issue, ie whether the first appellant's right of residence was linked to his contract of employment with the respondents. It is common cause that the first and second appellants have lived on Rietgat since 1982. Although at that time Rietgat was

registered in the name of the first respondent's father, both the first respondent and his older brother, Piet Swanevelder, testified that it was under the control of the latter. He had purchased it, but because he was employed and did not live on the farm he could not secure a loan from the Land Bank to finance his farming operations. It was for that reason that the farm was registered in the name of his father who was a full-time farmer. The versions of the first appellant and the first respondent as to who initially gave the former permission to reside on Rietgat differ. The first respondent's version, as confirmed by his brother Piet Swanevelder, is that the latter granted the permission while the first appellant testified that the first respondent's father did.

[7] I am prepared to accept, for present purposes, that the first appellant's version is correct. He testified initially that he was given permission to reside on Rietgat without having to give anything in return. In cross-examination, however, he stated, when asked why the first respondent's father would give him permission to reside on Rietgat, that Swanevelder senior gave him a dwelling place so that 'I must go and work for his son'. Although he later denied having made this statement the record is unequivocal. In my view the statement accords with the probabilities. A farmer does not usually give a person a potentially permanent place of residence without expecting such person to offer his labour in return. It is indeed common cause that the first appellant thereafter worked for Piet Swanevelder, together with the first respondent, on the farm Goedgedacht.

[8] It is not in dispute that from 1986 the first appellant worked for the first respondent in the latter's fencing business, but continued to reside on Rietgat. It is also not in dispute that in 1988 the Swanevelder brothers exchanged farms with the result that the first respondent took over Rietgat. The first respondent testified that when he took over Rietgat he and the first appellant entered into an agreement in terms of which the first appellant would continue to reside on Rietgat and that his right of residence would be directly linked to his employment contract. This evidence was not challenged in the court below and must accordingly be accepted. The court *a quo* held, correctly in my view, that this agreement superseded all previous agreements relating to the first appellant's right of residence on Rietgat. It follows that the first appellant's right of residence arose solely from his employment agreement.

[9] Related to the first issue is the question whether the first appellant's right of residence was lawfully terminated. Section 8(2) of ESTA reads:

'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 … .'

I have already mentioned (in para 2) that the fairness of the dismissal of the first appellant is not in issue, and it was not suggested that it was not in accordance with the provisions of the Labour Relations Act. It must, therefore, be accepted that the respondents were entitled to terminate the first appellant's right of residence.

[10] It is now convenient to consider the second issue in the appeal, viz whether the second appellant was an occupier in her own right. Mr Mokhari submitted that when the first respondent's father gave permission to the first appellant to reside on Rietgat in 1982 the second appellant was accorded tacit consent to reside there indefinitely as well. This argument is flawed. It is based on the first appellant's allegation, which I have rejected, that the consent to reside on Rietgat given to him by the first respondent's father was not linked to a condition that he works for Piet Swanevelder. The rejection of the first appellant's version in this regard disposes of the issue. The position then is that the second appellant's right of residence originated from her marriage relationship with the first appellant (*Venter No v Claassen en Andere* 2001 (1) SA 720 (LCC); *Dique NO v Van der Merwe en Andere* 2001 (2) SA 1006 (T)) and not in her own right.

[11] There remains the question whether the first appellant had committed such a fundamental breach of the relationship between him and the first respondent that it was not possible to remedy it. The fact that an occupier's right of residence has been terminated does not necessarily mean that the remedy of eviction will be available to the owner or person in charge of the land (cf *Mkhangeli and Others v Joubert and Others* 2002 (4) SA 36 (SCA) at 43 para [12]). Section 9(1) of ESTA provides that an occupier may be evicted only in terms of an order of court 'issued under this Act'. Section 9(2) reads:

'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 s 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 s 10 or 11 have been complied with; and

(d) … .'

(Subsection (d) deals with written notices of an intention to obtain an eviction order which the owner or person in charge of the land is required to give to the occupier, the municipality in whose area of jurisdiction the land in question is situated and the head of the relevant provincial office of the Department of Land Affairs.)

[12] Compliance with the requirements of ss (2)(a), (b) and (d) is not in dispute. As to ss 2(c) the provisions of s 11 are not applicable since the first appellant became an occupier before 4 February 1997. The respondents relied, for the eviction order, on s 10(1)(c), which is in these terms:

'An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if –

(a) …
(b) …
(c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.'

The circumstances which the respondents allege to have constituted a fundamental breach are (1) an unsubstantiated charge against the first respondent of theft of cattle, (2) conduct on the part of the first appellant which amounted to absconding from duty and (3) his continued insolence and unco-operative behaviour.

[13] The first appellant denied these charges. As to the charge of theft of cattle he testified that when he discovered in December 1998 that one of his calves was missing he confronted Mr Pitsi, who was employed by the respondents as a herder. Pitsi told him that his calf had been sold, but did not say who had sold it. The first appellant then enquired from the first respondent, who told him that it would be best if he (first appellant) looked

after the cattle on the farm so that he could look after his as well. It is common cause that on 8 February 1999 the first respondent called a meeting to discuss, *inter alia*, the issue of alleged missing cattle. Present at that meeting were first and second appellants, Pitsi, the second appellant's sister, Ms Phatudi and the first respondent. The first appellant testified that he heard for the first time at that meeting that Ms Phatudi had also lost a calf. He admitted that the second appellant demanded at the meeting that Pitsi tell the truth about the missing calves. It appears that no progress was made in this regard and the next day the second appellant, at the behest of the first appellant, went to the police at Nelspruit for assistance in searching for the missing calves.

[14] The evidence reveals that on 15 February 1999 the second appellant made an affidavit to the police in which, in essence, she alleged that on 15 December 1998 the first respondent loaded two young oxen that belonged to her and sold them; that he had not asked her and first appellant whether he could sell the oxen; that first appellant had heard from Frans Pitsi that the first respondent had sold the oxen and that the value of each of them was R1 000,00. The first respondent was subsequently informed by the police that a charge of theft of cattle had been laid against him.

[15] The first appellant denied that he had sent the second appellant to lay a charge against the first respondent. He said that he had merely wanted the police to investigate the disappearance of his calf. However, in his report in terms of s 9(3) of ESTA the probation officer recorded the following:

'The underlying factor which led to [the first appellant's] end of services was because of the fact that [the first respondent] started selling [the first appellant's] cattle without consulting him. It is understood that in 1993 [the first respondent] sold one cow of [the first appellant] without consultation and offered them R300,00 after they complained. The same situation occurred in 1988 and after the family complained he started threatening to evict them.'

When confronted with this report the first appellant denied that the probation officer ever interviewed him. But on 28 April 2002, and in response to the report, he deposed to an affidavit in which is stated that at the time that he was interviewed (obviously by the probation officer) his

eldest son was working for the first respondent. He also stated that he had had the report read and translated to him and that save for certain paragraphs that he wished to correct, he confirmed that the facts contained in the report were correct. It is clear from all this that the allegations of theft of his cattle as contained in the s 9(3) report came from the first appellant. One can safely conclude that the allegations of theft against the first respondent made by the second appellant to the police were made with the concurrence of the first appellant.

[16] But the first appellant's denial that he ever laid a charge or made allegations of theft against the first respondent to the probation officer – he denied that he had been interviewed by him – is evidence of the fact that such charges were unsubstantiated. I agree with the court *a quo* that the mere bringing of the theft charges which could not be substantiated constituted a very serious breach of the relationship between the first appellant and the first respondent and that such a breach is unlikely to be healed or remedied. This finding renders unnecessary a consideration of the other factors on which the respondents rely to show that the first appellant had committed a fundamental breach of the relationship between them.

[17] The following order is made:

The appeal is dismissed.

L MPATI DP

CONCUR:

STREICHER JA
NAVSA JA
HEHER JA
MOTATA AJA