

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 3028/06

In matter between:-

MINISTER OF LAND AFFAIRS

Applicant

and

FALATSI J MPHUTHI

1st Respondent

GRAMMAR J MPHUTHI

2nd Respondent

HEARD ON:

05 FEBRUARY 2009

JUDGMENT BY:

K.J. MOLOI, AJ

DELIVERED ON:

26 FEBRUARY 2009

JUDGMENT

- [1] The applicant in this matter, the Minister of Land Affairs, approached this court for an eviction order against the respondents from the property known as Portion 77 of Farm 1903 situated in the district of Harrismith, Free State Province. The respondents, owners of an adjacent property known as Portion 76 measuring 826,0112 ha which they

acquired from the applicant during 1998, have been occupying and utilising the said property of the applicant.

[2] The applicant contended the occupation of the property was illegal and that the same property was leased to one Roger Lehapa in 1993 and that the respondents occupied it forcefully. These allegations were confirmed by the said Lehapa who further claimed that, as a result of the illegal occupation of the property by the respondents, he could not utilise it for the purpose for which he leased it.

[3] Initially the respondents admitted they occupied the applicant's property but contended that the occupation was legal in that they had a lease agreement of property known as Unit 3.21 with the applicant since March 1994. The property, Unit 3.21, was later sold to them and they took transfer thereof from applicant in November 2006 against payment of R127 000,00. Only in January 2001 were they informed that the property, Portion 77 of farm 1903, was, in fact, leased to Lehapa and that they had to vacate it.

- [4] Both parties agreed that protracted discussions followed in an endeavour to resolve the dispute to no avail. According to the applicant and Lehapa the resolution of the dispute was made impossible by the respondents' intransigence, arrogance and aggressive attitude. The respondents, on the other hand, contented that they initially laboured under a *bona fide* belief that they were entitled to occupy the property as they bought it from the applicant and the property formed part of Unit 3.21 they had purchased. The respondents later conceded, however, that in April 2007, after they were shown aerial photographs of the surroundings and the land surveyor's report, for the first time, they realised that Portion 77 did not form part of Unit 3.21 they first leased and later bought from the applicant. They were also advised to vacate the applicant's property.
- [5] Despite this realisation of the true state of affairs and the advice they were given, they persisted in their refusal to vacate the applicant's property. The reasons given by the respondents why they would not vacate the applicant's property were because on that property, Portion 77, there is a homestead occupied by their seven family members. They

had effected repairs to the broken windows of the homestead to the amount of R6 350,00 to make it habitable and they had added two additional rooms to it at the cost of R46 000,00. On their acquired property *viz* Portion 76 (initially Unit 3.21), there is no homestead or structure to live in and it would take them approximately six months to erect a homestead there whereafter they could vacate Portion 77. The respondents did not contend they had no means to erect such a homestead on their property.

- [6] At the end of their eleven page answering affidavit they added a single paragraph that they had been advised that, (as they belonged to the black community), they qualified as occupiers under the provisions of Extension of Security of Tenure Act, No. 62 of 1997 (ESTA) and that there had been no compliance with the provisions of that Act to enforce their eviction. To this end the respondents stated they did not employ any other person(s) save for the members of their family whose ages range from 24 years to 34 years to work the land and they did not have income in excess of R5 000,00 per month.

- [7] The respondents used the applicant's land to cultivate crops, to graze their stock and also exploited the plantation thereon over and above their own 826,0112 ha farm in addition to occupying the homestead thereon.
- [8] The application for an eviction order was launched on 17 July 2006. The opposing affidavit was filed on 2 June 2008 as the protracted discussions took place in between without success. The application served before me on 11 December 2008 and as the respondents' entire argument was then premised on the provisions of ESTA, the hearing was postponed to 5 February 2009 and the parties were asked to prepare and address me on the following aspects:
- (i) whether the respondents qualified as "occupiers" in terms of the Extension of Security of Tenure Act, 62 of 1997, (ESTA); and
 - (ii) whether, in view of the provisions of section 17(1) and (2) of ESTA, the High Court was entitled to consider a defence based on the non-compliance of the provisions of ESTA.

[9] The questions above were raised as I was of the view that section 17(1) and (2) of ESTA, in the absence of consent by the parties, precluded the High Court from entertaining a matter under ESTA. See **KHUMALO v POTGIETER** 2001 (3) SA 63 (SCA) at 67E – F and **MKANGELI AND OTHERS v JOUBERT AND OTHERS** 2002 (4) SA 36 (SCA) at 42C – D. The parties readily agreed that if the matter is based on the provisions of ESTA, the High Court did not have jurisdiction to entertain it unless the parties had consented thereto.

[10] As regards the question whether the respondents qualified for protections afforded by the provisions of ESTA, the respondents' counsel submitted they did simply because they had a lease agreement with applicant since 1994 (this being the same agreement the respondent's conceded was not in respect of the disputed property); neither of them had an income exceeding R5 000,00 per month; only members of the family maintained the land and were not using it for industrial, mining, commercial or commercial farming purposes. (See section 1 of ESTA – the definition of 'occupier'.) The applicant's counsel, on the other hand,

contended that protection under ESTA was afforded only to an occupier who occupied another's land legally and the respondents' were not. See **AGRICO MASJINERIE (EDMS) BPK v SWIERS** 2007 (5) SA 305 (SCA). On behalf of the applicant it was further submitted that the basis of the application and the bulk of the opposition thereto was common law and that ESTA was sneaked in only to deflect the court's attention in an endeavour to oust the court's jurisdiction. The provisions of section 17(1) and (2) of ESTA did not deprive the court of jurisdiction to hear the matter especially as the respondents did not qualify as occupiers thereunder.

[11] The following factors are common cause:

- (i) The applicant is the owner of the property in question;
- (ii) The respondents occupied the said property for cultivation of the lands, the grazing of their stock, the utilisation of the plantations and residence in the homestead;
- (iii) The occupation of the property was not based on any consent or agreement and the respondents conceded

they *bona fide* believed that the property formed part of the land they initially leased from the applicant and later acquired, which belief was mistaken;

- (iv) Since April 2007 when the aerial photographs of the area and the surveyor's report were shown to them, the respondents realised the disputed property belonged to the applicant and that the purported lease agreement had no bearing on it;
- (v) They were also advised to vacate the property in question as they had no right to occupy it;
- (vi) The respondents had been served with eviction notice on 11 August 2003 and were all along aware that they had to vacate the applicant's property;
- (vii) The respondents needed a period of approximately six months to erect a dwelling on their farm since April 2007 when they realised they had no right nor title to the property in question but, by 5 February 2009 when the matter was further argued before me, and since April 2007, approximately twenty-two months later, they still resisted vacating the applicant's property despite the fact that they had no

financial constraints to erect a homestead on their own property adjacent to the applicant's property.

[12] The purpose of ESTA was succinctly put as:

“Generally speaking ESTA protects a particular class of impecunious tenant on rural and semi-rural land against evictions from that land. The underlying basis for their protection is that they acquired their tenancy with the consent of the owner. The term used by ESTA to describe the class of tenants protected by it is ‘occupiers’.”

See **MKANGELI AND OTHERS v JOUBERT AND OTHERS**, *supra*, at 42I – J (par. 9) and sections 1 of ESTA defining “occupier”.

[13] It needs to be mentioned that consent can be express or tacit according to the definition of consent – section 1 of ESTA. In terms of section 3(4) and (5) of ESTA consent or knowledge of residence can be presumed based on the length of the period of residence on another's property if such residence was continuous and open for the periods mentioned therein.

These presumptions are, however, not applicable where the State is the owner of the land - See section 3(6) of ESTA.

- [14] While it is true that the High Court has no jurisdiction to hear the matters in which ESTA is raised as an issue without consent of both parties, in this case the court can in view of the fact that the application was based on common law and 95% of the defence as well. Only a negligible part, in passing, referred to the provisions of ESTA though much was made of it during argument. In **AGRICO MASJINERIE (EDMS) BPK v SWIERS**, *supra*, at 316B – C (par. 22) the following was said by Heher, JA:

“...There is no warrant for further restricting the ordinary power of a High Court to interpret the provisions of ESTA if such an exercise is relevant to the determination of a dispute before it.”

- [15] The respondents in this matter are farm owners and live adjacent to a farm they initially believed they had a lease over but realised, in due course, they did not. The initial occupation did not have a legal basis nor consent of the owner as this was based on a mistaken but *bona fide* belief

that they had a lease over the land and it became clear, on their own admission, in April 2007 that the lease agreement did not relate to the disputed property. They utilised the property for residence, cultivation of crops, grazing of livestock and exploitation of plantation. All these activities are generally conducted by commercial farmers and unquestionably are commercial farming activities as referred to in the definition of “occupier” in section 1 of ESTA. The respondents can, as a result, not be the persons entitled to the protection of ESTA, simply because they belong to the so-called “previously disadvantaged” group.

- [15] The applicant has met all the requirements of proving entitlement to the relief sought under common law. The respondents have not been successful in proving their entitlement to the protection afforded by ESTA and have no defence against the relief sought. See **SKHOSANA AND OTHERS v ROOS t/a ROOS SE OORD AND OTHERS** 2000 (4) SA 561 (LCC).

- [16] The following order is made:

1. That the respondents are ordered to forthwith vacate the fixed property of the applicant known as Portion 77 of the Farm 1903, district Harrismith, Free State Province – Subdivision Plan No. SG914/1998, Sheet 7;
2. That in the event of the respondents failing to comply with paragraph 1 above, the Sheriff, Harrismith, is empowered, authorised and instructed to enter onto the property and forcibly evict the respondents as well as any other person claiming occupation through them from the property.
3. That the respondents are jointly and severally, the one paying, the other to be absolved, ordered to pay the costs of this application.

K.J. MOLOI, AJ

On behalf of the applicant:

Adv. S.E. Motloun
Instructed by:
The State Attorney
BLOEMFONTEIN

On behalf of the Defendant:

Adv. J.J.F. Hefer
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN