

IN THE LABOUR COURT OF SOUTH AFRICA

**HELD AT CAPE TOWN
CASE NO: C45/99**

In the matter between:

ALBERT FAURE t/a FAURE BROS.	First Applicant
JOHANN FAURE t/a FAURE BROS.	Second Applicant
NOEL FAURE t/a FAURE BROS.	Third Applicant

and

BURNETT ROBERT MARAIS	Respondent
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JUDGMENT

BENJAMIN A.J.

The Respondent, Marais, was employed by the Applicants as a farmworker on their farm in the Faure district of the Western Cape. In September 1998, he was dismissed. The Respondent challenged the fairness of his dismissal and referred the dismissal dispute to the CCMA. A conciliation hearing chaired by Commissioner Mr Jan Theron was held on 8 December 1998. The Respondent was assisted at this hearing by an official of the General Workers Association, a trade union of which he is a member.

2 According to the Applicants, a settlement agreement was concluded between the Applicant and the Respondent in terms of which-

the Applicants agreed to pay the Respondent by 18 December 1998 a sum equivalent to twelve

weeks' wages in full and final settlement of any claim he may have against them;

(b) the Respondent would vacate the house he occupied on the Applicants' premises by 17 January 1999.

The money was duly paid to the Respondent. However, the Respondent has not vacated the house in compliance with the agreement at the CCMA. The Applicants now seek to have this agreement made an order of the Labour Court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1998 ('LRA'). The Respondent opposes this relief on the basis that the relief sought amounts to an order of eviction which section 9 of the Extension of Security of Tenure Act 62 of 1997 ('ESTA') prevents the Labour Court from granting. The determination of this issue necessitates an examination of the intersection between the powers of the Labour Court in terms of the LRA and the provisions of ESTA regulating the granting of eviction orders.

Before proceeding to do so, it is necessary to mention one other aspect of the history of this dispute.

On 22 January 1999, the Applicants removed the Respondent, his family and their possessions from the house they occupied on the farm. The Respondent and his wife then brought an urgent application in the High Court to restore their occupation of the house. This application led to the conclusion of an agreement which was made an order of the High Court restoring the Respondent's right to occupy the house and use land on the Applicants' farm. In his founding affidavit in the High Court application, the Respondent stated that the dismissal dispute which he had referred to the CCMA resulted in his receiving compensation equivalent to twelve weeks' wages. However, he denied agreeing to vacate the premises by 17 January 1999 and denied having signed the settlement agreement at the CCMA in which he is alleged to have made this undertaking.

Following the High Court order, the Applicants instituted urgent proceedings in the Labour Court for the disputed CCMA agreement to be made an order of the Labour Court in terms of section 158(1)(a) of the LRA.

The application of ESTA

ESTA is, in the words of the Land Claims Court, an “involved piece of legislation” that regulates rights of residence of persons on much of the land of South Africa. In terms of its long title, the purpose of ESTA is-

“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 connected therewith”.

As the Land Claims Court indicates in its judgment in *Karabo and Others v Kok and Others* 1998 (4) SA 101 4 (LCC), the Act broadly speaking applies to all land other than land in a township or land encircled by a township (at 1019 B-C). ESTA’s application is not confined to land used for agricultural purposes. Accordingly, it has relevance to disputes concerning the occupation of land used for industrial, mining or other commercial purposes if that land is not in a township or encircled by a township. This point is illustrated by the facts in the *Karabo* case which concerned employees of a quarry and brick works who resided on their employer’s property.

It was common cause that the Respondent was an employee and an occupier of land contemplated by the ESTA and therefore entitled to its protections. His rights were not effected by any

exclusions in the Act. For instance, the Act does not apply to occupiers earning in excess of a prescribed amount (currently R5 000 per month).

Orders of eviction

Section 9(1) of ESTA provides that-

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

In terms of Chapter V of ESTA, the jurisdiction to grant orders of eviction is restricted to the Land Claims Court, the magistrate’s courts and, if all the parties consent, the High Court.

0 It is evident from the introductory phrase of section 9(1) of ESTA cited above that Parliament intended ESTA to prevail over any conflicting legislation, including the LRA. Section 210 of the LRA provides that the LRA will prevail over the provisions of any other law “save the Constitution or any Act expressly amending” the Labour Relations Act. ESTA is not an Act expressly amending the Labour Relations Act. However, it is a subsequent enactment and therefore takes precedence in terms of the normal rules of interpretation. This conclusion is also supported by a purposive interpretation: it could not have been the intention of section 210 of the LRA to exclude employees who occupy land in terms of their employment relationship from the extensive rights created by ESTA. The unambiguous effect of ESTA is to exclude the power to grant an order of eviction of an occupier of land protected by ESTA from the jurisdiction of the Labour Court.

1. ESTA sets out the requirements to be satisfied before an order of eviction can be granted. These are-

- (a) the right of residence of the person sought to be evicted must have been terminated. (Special requirements apply in respect of persons whose right of residence arises solely from an employment agreement I will return to these later;)
- (b) the owner or person in charge of the land must have given at least two calendar months' written notice of the intention to obtain an order for eviction to the occupier, the municipality in whose jurisdiction the land is situated and the head of the relevant provincial office of the Department of Land Affairs. An order of eviction may only be obtained if the occupier has not vacated the land within this notice period;
- 2 That these two requirements are satisfied does not give an applicant an automatic right to obtain an eviction order. Sections 10 and 11 of ESTA give the court a broad jurisdiction to determine whether the granting of an order of eviction would be just and equitable. In determining this, the court is required to consider factors such as the circumstances under which the right of occupation was terminated and the availability of suitable alternative accommodation. In terms of s 23 of ESTA, it is a criminal offence to evict an occupier of land without the authority of an order of a competent court.

Termination of employment prior to eviction

- 3 Section 8(2) of ESTA provides that the right of residence of a person which arises solely from an employment agreement may be terminated if the person resigns from his or her employment or is dismissed in accordance with the provisions of the Labour Relations Act. In terms of section 8(3) any dispute over whether a person's employment has been lawfully terminated must be dealt with

in accordance with the provisions of the Labour Relations Act and the termination only takes effect when the dispute has been determined in accordance with the Act. The effect of these provisions are dealt with in the *Karabo* judgment, in which the court states that:

“In this case, there is a dispute over the validity of the termination of the employment of the labourers, and this dispute is being dealt with under the provisions of the Labour Relations Act. Because the dispute is still pending, the termination of the employment for purposes of the Tenure Act has not yet taken effect.” (at 1020 D-E)

4 The court goes on to say that:

“The termination of the occupier’s employment as envisaged in section 8(3) must, under the provisions of section 8(2), be in accordance with the provisions of the Labour Relations Act. This means that the validity of the termination is an issue.” (at 1022G)

5 The effect is that proceedings to evict an employee from accommodation on land falling under ESTA which the employee occupies by virtue of an employment contract can only commence once any dispute over the lawfulness of the dismissal in terms of the LRA has been concluded. The Land Claims Court (and the Magistrate’s Court exercising jurisdiction under ESTA) have no power to determine the fairness or lawfulness of a dismissal in terms of the LRA. This is the sole preserve of the Labour Court or an arbitration held under the LRA.

Can agreements concerning rights of residence be concluded at the CCMA?

6 In argument, Mr Maher suggested that it may have been inappropriate for the CCMA to allow an agreement to vacate property to be concluded under its auspices. To the extent that it is an aspect of an employment relationship, the right to occupy land, including an undertaking to vacate premises, is a matter of mutual interest to employers and employees. It may therefore properly be dealt with in a settlement agreement, including a collective agreement, concluded under the auspices of the CCMA or, for that matter, a bargaining council. The enforcement of such an agreement will fall, in part, to the CCMA and the Labour Court and, to the extent that it involves an

order of eviction, to the Land Claims Court or a Magistrate's Court. This dual jurisdiction does not deprive the CCMA of the jurisdiction to supervise a settlement on these terms.

- 7 The agreement however is only the starting point of proceedings under ESTA to obtain an eviction order. Whether an order will be granted depends on whether the court considers the agreement to be "just and equitable". The circumstances in which the agreement was concluded may be evaluated in terms of section 25 of ESTA. This provides that:

"25 Legal status of agreements

The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of a court.

A court shall have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act.

Notwithstanding the provisions of subsections (1) and (2), if an occupier vacates the land concerned freely and willingly, while being aware of his or her rights in terms of this Act, he or she shall not be entitled to institute proceedings for restoration in terms of section 14."

The papers in this case do not deal with whether the Respondent's attention was drawn to his rights under ESTA. Commissioners who deal with these disputes should be in a position to advise workers of their rights under ESTA.

Can the settlement agreement be made an order of the Labour Court?

- 8 The Respondent is alleged to have agreed to vacate the house he occupied on the Applicants' farm by 17 January 1999. To make the agreement containing this undertaking an order of the Labour Court in terms of section 158(1)(c) of the LRA would amount to making an order of eviction. If the Respondent remained in possession, a deputy sheriff to whom the order is taken would interpret it as an order authorising him to evict the Respondent from the premises.

9 The Applicants proceeded to the Labour Court to have the settlement agreement made an order of Court in terms of section 158(1)(c). The Labour Court has no power to grant this order and accordingly that portion of the application must fail.

Should declaratory relief be granted?

0 During argument, the representative of the Applicants, Mr Moffit, indicated that the Applicants sought, in the alternative, a declaratory order confirming that the Respondent had been dismissed in accordance with the Labour Relations Act. Mr Maher for the Respondent argued that this relief should not be granted because it was academic in nature. He also argued that the Applicants' request for this relief amounted to an abuse of the court process because they had sought an order of court in terms of section 158(1)(c) on an urgent basis in order to achieve the Respondent's eviction.

1 Mr Maher's submission that a declaratory order confirming that there has been a settlement should not be granted is probably correct for most cases. However, his submission is not correct in respect of this case as there is a dispute over whether there is a settlement agreement. He also argued that the dispute of fact was not one which should be resolved on the papers and therefore I should not make an order of the type contemplated without a referral to oral evidence.

2 This would be inappropriate. The dispute is simple. In the urgent proceedings in the High Court, the Respondent and his trade union representative denied that the Respondent had signed the CCMA settlement agreement or that the Respondent had agreed to vacate the property by 17 January 1999. On the other hand, the Applicants filed an affidavit by Mr Jan Theron, the Commissioner, in

which he confirms that both Mr Marais and the representatives of his union were present when the agreement was drafted and that the contents of the agreement was confirmed in their presence before the Respondent and the Applicants signed the agreement in his presence. There is no basis on which I can reject the affidavit filed by Mr Theron and refer the matter for oral evidence.

3 It is undesirable that a dispute concerning whether a settlement agreement was concluded at the CCMA should continue. On the papers, it is evident that an agreement was concluded. The Applicants are entitled to an order from the Labour Court declaring this to be so. They require this to persuade a court having jurisdiction under ESTA that the Respondent's right of residence has been terminated because he was dismissed in accordance with the provisions of the Labour Relations Act. This order is not an eviction order. It does not entitle the Applicants to obtain an eviction order immediately. It merely allows them to set in motion the process towards applying for an order of eviction under ESTA. They still have to give the Respondent at least two months' notice of their intention to do so.

4 The order will prevent a dispute arising in a court with jurisdiction under ESTA concerning whether, for the purposes of sections 9(2) and (3) of ESTA, the employment of the Respondent has been terminated in terms of the Labour Relations Act. Had there not been a dispute on the papers concerning the agreement struck at the CCMA on 8 December 1998, the necessity for this relief would not have arisen.

5 While I am granting this order to the Applicants, the Respondent has been substantially successful in resisting the relief sought by the Applicants and accordingly, the Applicants are liable for the costs of the Application.

6 I accordingly make the following order:

The Respondent undertook in a settlement agreement dated 8 December 1998, concluded under the auspices of the CCMA, to vacate the house he occupied on the Applicants' farm by 17 January 1999;

The Labour Court has no jurisdiction to make the agreement of settlement an order of this Court;

The Applicants are ordered to pay the costs of the application.

BENJAMIN AJ

Acting Judge of the Labour Court

SIGNED and DATED this 19th day of MARCH 1999.

DATE OF HEARING: 12 March 1999

DATE OF JUDGMENT: 23 March 1999

FOR THE APPLICANT: Mr LS Moffit of Morkel & De Villiers Inc.

FOR THE RESPONDENT: Adv A Maher
Instructed by Lawyers for Human Rights