IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC 89R/02
In chambers: **GILDENHUYS AJ** **MAGISTRATE'S COURT CASE NUMBER**: 2837/02

Decided on: 23 September 2002

In the review proceedings in the case between:

OVENSTONE FARMS (PTY) LTD Applicant

and

SMITH C First Respondent

SMITH J Second Respondent

JUDGMENT

GILDENHUYS AJ:

[1] In this matter, Ovenstone Farms (Pty) Ltd applied in the Magistrate's Court, Caledon, for the eviction of Cornelius Smith (first respondent) and Johanna Smith (second respondent) from the farm commonly known as High Noon. The second respondent is the wife of the first respondent. The respondents did not defend the application. On 26 August 2002 the Magistrate, Caledon made an order as follows:

> "***BEVEL VAN DIE HOF:***
> 1. Uitsettingsbevel verleen
> 2. Die hof gelas dat die respondente die perseël voor of op 2002 10 14 ontruim.
> 3. Dat is (*sic*) applikante die respondente tot tevredenheid van die hof ten minste 10 dae voor die datum van uitsetting kennis gee van die uitslag van die Hersieningshof.
> 4. Indien die respondente versuim om die huis voor of op 2002 10 14 te ontruim mag die uitsetting geskied op 2002 10 17.
> 5. Die bevel word opgeskort hangende hersiening (Art. 19(3)).
> 6. Kostebevel teen respondent."

The matter came before me on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act,[1] hereinafter referred to as "ESTA".

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1 Act 62 of 1997, as amended.

[2] The first respondent was at all relevant times an employee of the applicant. He was allowed to occupy, together with the second respondent, a house on the farm. His right of residence arose solely from his employment agreement. The first respondent is an occupier as defined in ESTA. The second respondent has no independant right to reside on the farm. Her right to live in the house emanates from her relationship with the first respondent. She is not an occupier in her own right.

[3] A court may make an order for the eviction of an occupier and his or her family if the requirements of section 9(2)(a), (b), (c) and (d) of ESTA have been met. In this case, the requirements of section 9(2)(a), (b) and (d) were met. The requirements of section 9(2)(c) were, in my view, not met.

[4] Section 9(2)(c) of ESTA stipulates that the requirements for an eviction order contained in section 10 or 11 of ESTA must have been complied with. In this case, section 10 is applicable. Broadly speaking, section 10 allows the eviction of an occupier under any one of three discrete sets of circumstances. The first set, in general terms, comprises instances where the occupier has done something seriously wrong or, if he or she is an employee whose right of residence arose solely from his or her employment agreement, where he or she has voluntarily resigned.[2] The second set bears upon instances where suitable alternative accommodation is available to the occupier.[3] The third set applies when there is no suitable alternative accommodation available, but where the three threshold requirements imposed by section 10(3) of ESTA have been met, and where it is just and equitable that the occupier shall be evicted.[4] The subsection reads as follows:

> "(3) If -
>
> (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
>
> (b) the owner or person in charge provided the dwelling occupied by the occupier; and

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2 Section 10(1) of ESTA.

3 Section 10(2) of ESTA.

4 Section 10(3) of ESTA.

> (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,
>
> a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to -
>
> (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and
>
> (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted."

In the cases of *Ovenstone Farms (Pty) Ltd v Arends and Others*[5] and *Ovenstone Farms (Pty) Ltd v Persent and Another*[6] I pointed out, in a judgment delivered on 8 July 2002, that compliance with section 10 or 11 of ESTA is aimed at ESTA's social interest objectives. They articulate the very purpose for which ESTA was enacted. I remarked that, in practice, applicants often give scant attention to them when motivating eviction applications. Although both the applicant and the attorneys for the applicant, in this case, are the same as in the two cases mentioned above, my remarks seem to have fallen on deaf ears.

[5] The applicant in this case deals with the requirements of section 10 of ESTA in a single paragraph contained in an affidavit made by its managing director, as follows:

> "It is my respectfull (*sic*) submission that the fact that the First Respondent's absence from work on both the 7th August as well as the 8th of August 2000, without prior permission, constituted such a serious breach of the relationship between the First Respondent and the Applicant that it is not practically possible to mend the relationship between both parties and the Honourble (*sic*) Court may therefore give an order for the eviction of the First Respondent without being convinced that suitable accommodation exists for both the Respondents."

This paragraph is directed at section 10(1)(c) of ESTA, which allows a court to grand an eviction order if:

> "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".

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5 LCC 60R/02, 8 July 2002, available from www.law.wits.ac.za.

6 LCC 58R/02, 8 July 2002, available from www.law.wits.ac.za.

No details were given of the circumstances of the two-day absence without leave. On the information given, I cannot imagine how it could have been concluded that a mere absence from work for a two-day period could constitute an irremediable breach of the relationship between the applicant and the first respondent.[7]

[6] There seems to have been an attempt, on the part of applicant's attorney, to justify an eviction order under section 10(3) of ESTA by setting forth additional facts in his heads of argument. The relevant portion of his heads of argument reads as follows:

> "Dit blyk duidelik uit die beëdigde verklaring van Mnr A P Tucker, aangeheg aan die Kennisgewing van Mosie, dat die Applikant 'n tekort aan geskikte behuising ondervind. Hierdie situasie word vererger deurdat persone wat regmatiglik afgedank is, weier om hul akkommodasie te verlaat wat tot gevolg het dat ander werknemers, met gesinne, in ontoereikende enkelkwartiere gehuisves moet word.
>
> Gesien in die lig dat die Eerste Respondente se diens alreeds bykans twee jaar gelede beëindig is, bestaan daar 'n wesenlike gevaar dat 'n persepsie by die ander werknemers van die Applikant kan ontstaan dat, ongeag watter omstandighede aanleiding gegee het tot 'n persoon se ontslag, gemelde persoon se verblyf in een van Applikant se wonings nie beëindig kan word nie.
>
> Dit is voor die hand liggend dat 'n eskalering van soortgelyke gevalle ernstig ekonomiese gevolge vir die Applikant sowel as sosiale ontbering vir ander werknemers sal inhou."
> (My emphasis)

The underlined portions of these submissions are not substantiated by any factual allegations in any of the affidavits before the Magistrate's Court. Although the founding affidavit by the applicant's managing director was signed as long ago as 11 September 2001, the case was heard and the eviction order was granted only on 26 August 2002, well after the other two *Ovenstone Farms* judgments were delivered. In application proceedings, facts must be introduced in evidence through affidavits and not through heads of argument. It is distressing, not only that the same attorney applied for an eviction order on the kind of evidence which the two previous *Ovenstone Farms* judgments have indicated to be insufficient to satisfy section 10, but also that the same magistrate granted the eviction order.

[7] In this case, on the information before the Court, an eviction order could not have been granted under section 10(1). An eviction order might be possible under section 10(3), if the necessary factual foundation is laid by means of competent evidence. In doing so, the applicant

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7 See *Ovenstone Farms (Pty) Ltd v Arends and Others*, n5 above, para [12] - [14], where the nature of the relationship envisaged in section 10(1)(c) of ESTA and the breach of such a relationship, is discussed.

should deal with every paragraph of section 10(3) [paras (a), (b), (c), (i) and (ii)]. That was not done in this case. Even the factual allegations contained in the heads of argument (which are not evidence), do not fully address the requirements of section 10(3). In the light of the applicant's disregard for the findings made in the previous two *Ovenstone Farms* cases, I seriously considered setting the eviction order aside and leaving it to the applicant to commence fresh proceedings, should it wish to do so. However, the deficiencies in the affidavits may not be the fault of the applicant, but that of its attorney. I have therefore decided to give the applicant an opportunity to reapply for the eviction of the respondents on the same papers, supplemented as it may be advised.

[8] For the reasons set out above, I order as follows:

(1) The eviction order of the Magistrate, Caledon, made on 26 August 2002, is set aside in whole.

(2) The applicant is given leave to renew its application for the eviction of the respondents, on the same papers, supplemented as it may be advised, on notice to the respondents and by not later than 18 October 2002.

(3) Any fresh eviction order which the magistrate may grant is subject to automatic review by this Court.

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ACTING JUDGE A GILDENHUYS

For the applicant:
Guthrie & Theron, Caledon.

For the respondents:
Absent.