IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case No LCC14R/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED: YES / NO

3/11/2014
DATE

SIGNATURE

In the matter between:

THE MONT CHEVAUX TRUST (IT 2012/28) **Applicant (Respondent in the application for leave to appeal)**

and

TINA GOOSEN & 18 OTHERS **Respondents**

(Applicants in the application for leave to appeal)

JUDGMENT

---

1. The respondents in the principal application apply for leave to appeal to the Supreme Court of Appeal, alternatively to this court, against this court's confirmation of the Magistrate's Court of Wellington's order evicting the respondents from the applicant's farm when the order was submitted for automatic review in terms of section 19 (3) of the Extension of Security of

Tenure Act 67 of 1997 ('the Act'). The parties are referred to as they are identified in the principal application.

2. For purposes of this judgment the following common cause background is relevant:

   a) The eviction application at issue here was the second of its nature brought against the respondents;

   b) The respondents faced an earlier eviction application at the instance of the previous owner of the farm, which application was properly served on the respondents in accordance with the provisions of section 9 (2) (d) (i) of the Act read with Regulation 11 and Form E.

   c) The complete first application was annexed to the second application.

   d) The respondents have been guilty for years, long before the applicant acquired the farm under the mistaken impression that the respondents were about to move to other premises, of the most offensive, abusive, threatening and often downright criminal behaviour toward the applicant's beneficiaries and trustees which certainly gives the owners more than enough reason to seek their eviction. Any requirement that might have to be fulfilled in terms of section 6 (3) of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"), read with section 10 (1) (a) and (c) thereof has been met by the objectionable conduct of the respondents. It must also be underlined that the respondents are the only occupiers of the applicant's farm and that each and every transgression the applicant complains of has been committed by one or more of the respondents.

   e) The first eviction application launched in the Magistrate's Court by the previous owners of the immovable property was granted. When it came

before this court on review, Gildenhuys J convened a special sitting to establish whether the gross conduct complained of could be linked to individual respondents. This special hearing ended inconclusively without any judgment having been given. It should be noted at this stage already, however, that the special hearing could never have been convened if Gildenhuys J had not been satisfied that there had been proper service on the respondents and that the then applicants had established a cause of action, albeit without being able to ascribe individual transgressions of the occupiers' duty to respect the rights of the owners to individual transgressors.

f) The special hearing presumably never came to fruition because the then applicants sold the farm to the present applicant, who purchased in the belief that the problems with the occupiers had been resolved.

g) The respondents were clearly aware of the fact that their conduct entitled the applicant to launch the present proceedings. The court *a quo* granted an eviction order after hearing argument presented by the respondents' attorney, who restricted his argument to the applicant's alleged inability to identify individual perpetrators of the offensive conduct and to the submission that the applicant should rather sue the previous owner for breach of contract than to evict the respondents.

h) As I pointed out in the review judgment, neither party adverted in the court *a quo* to the fact that service of the eviction application was effected by the sheriff, and that the prescripts of section 9 (2) (d) (i) and Form E were not observed when the present application was commenced. This is a clear indication that the respondents were in no way prejudiced in their defence

by the failure to strictly comply with the prescribed fashion in which eviction applications ought to be instituted.

i) This court confirmed the eviction order, holding that substantive justice had been done in the light of the facts of this particular case. As the respondents were fully aware of their rights, obtained legal representation, had sufficient opportunity to instruct their legal representatives and were given a fair trial during which they could raise every point they regarded as important, it would have undermined the very essence of the court's duty to allow justice to prevail over technicalities, to insist upon the strict observance of the prescribed service of the application. To do so in the present instance would have amounted to a hollow gesture, as the respondents had not been prejudiced at all by the incorrect service, while observance of the formalities would only have served to further delay the termination of the unlawful infringement of the applicant's rights. See: *Mgro Properties (Pty) Ltd & Another v Abraham Snyers & Another* Case No LCC 05/2013, (17 April 2014, not yet reported)) at para [12].

3. The respondents now seek leave to appeal to the Supreme Court of Appeal against the confirmation of the eviction order.

4. The first question that arises is whether an appeal lies to the Supreme Court of Appeal or to this court. A confirmation of an eviction order is a confirmation of an order of the Magistrate's Court, which remains an order of that court after confirmation. Confirmation does not elevate the original judgment to one of the Land Claims Court. An appeal would consequently lie to the Full Bench of this Court; see: *Kuilders & others v Pharos Properties CC & Others* 2001 (2) SA 1180 (LCC); *Magodi & Others v Janse van Rensburg* [2001] JOL 9145

(LCC); *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA) at par [5]. If leave to appeal were to be granted, it would have to be to the Full Bench of this Court. The next question that must be addressed is whether leave to appeal should be granted, and if so, on what basis.

5. This Court has the status of a High Court. As such, the new Superior Courts Act 10 of 2013 .applies to it. The said Act commenced on the 23rd August 2013. Consequently the provisions of section 17(1) of this Act apply to proceedings that were launched after its coming into effect, the application for leave to appeal having been launched in May 2014. The relevant section reads as follows:

> ***'17. Leave to appeal.***—*(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—*
> *(a) (i) the appeal would have a reasonable prospect of success; or*
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
> *(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'*

6. It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. This new standard is applied by Section 37 (4) (b) of the Restitution of Land Rights Act 22 of 1994 to this court's duty to consider the prospects of an intended appeal.

7. The grounds of appeal advanced in the notice of application for leave to appeal cover virtually every aspect of the disputes raised in the affidavits that

served before the court a *quo*, but during argument counsel for the applicants relied principally upon the submission that the court *a quo* had erred in granting an eviction order without service upon the respondents that complied meticulously with the provisions of the Act and Form E. Analysing ESTA in some detail counsel underlined that it is couched in terms that seek to protect the individual occupier from exploitation and unfair eviction. As the termination of the right to occupy any dwelling or land impacts upon the occupiers' fundamental right to housing - see *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) - the courts must jealously guard against any process that does not ensure that every occupier who might lose a right to occupation, is given ample notice of any steps that are to be taken and is fully aware of his right to be heard before any decision to evict is taken. It is for this reason that ESTA is couched in peremptory terms. See, *inter alia,* Meer J (as she then was) in *Van Wyk v Khosa* [2001] 3 All SA 248 (LCC); *ABJ Boerdery v Mzamo & Another* [2001] ZALCC 11.

8. Once an occupier knows that he and others holding through him or her face eviction through a judicial process, the purpose of the protection granted by the Act has been achieved, provided that the occupier is given every opportunity to advance any defence at his disposal or make submissions regarding the effect any eviction will have upon him or her. He has the right to insist upon a report informing the court of the availability of alternative housing and dealing with the social disruption that an eviction order may cause. The occupier has the right to demand that the local authority investigate the existence of alternative accommodation and that local, provincial and national

authorities are engaged to ensure the provision of alternative housing for the homeless.

9. Once these steps have been taken, however, the purpose of the relevant provisions has been achieved. Compliance with the steps that need to be taken to protect the occupier must not be achieved merely for compliance's sake. Evictions are by the very nature thereof emotional issues that have social and political implications. The court must guard against falling into the trap of excessive formalism if it is indisputable that the object of the provisions enacted for the protection of occupiers has been achieved and that the occupier or occupiers' insistence upon compliance is an abuse of the system designed to prevent injustice; thereby inviting the court to commit injustice upon the applicant entitled to the protection of his or her right to terminate unlawful interference with his or her or its right to enjoyment and use of the property.

10. That is the object the applicants are pursuing in this instance. As has been stated above, they faced an earlier eviction application that complied fully with all statutory safeguards created for their protection. They were ordered to vacate the property but failed to comply. They were given the opportunity and the privilege when the previous application served before this court for confirmation upon review to assist the court to identify the individuals that were responsible for the reprehensible conduct the owner has been subjected to. They failed and refused to co-operate. They shielded the perpetrators and ensured their anonymity as part of the group of occupiers through their collective silence. They continued their actions even though the court proceedings had demonstrated what the consequences thereof would be.

They frustrated this court's extraordinary attempt to limit the effect of the eviction order to only those individuals that could be proven to have committed the offensive acts. If there are any adults in the group of occupiers who have never participated in any of the reprehensible actions the others are guilty of, they have made themselves parties to such conduct by failing to identify the actul perpetrators. They have only themselves to blame - if indeed there are any adults who have not infringed the owner's rights.

11. Appreciating the implications of the above facts, counsel for the applicants relied strongly upon the argument that the statute did not intend or allow collective service upon a group of persons such as his clients in emphasizing that that there was no compliance with service as intended in section 9 (2) (d) (i). Nor did it contemplate eviction of a group of persons if the individuals of which the group was composed, were not identified individually and were not ordered to vacate the premises they occupied individually. Eviction proceedings had to be undertaken against each and every individual separately, so the argument ran.

12. As a general proposition this argument may be correct. On the other hand, however, the court must guard against a cynical appeal to enforce procedural provisions designed to protect victims of social and commercial inequality caused by our country's unfortunate history in cases where the need to rely upon the protection of those procedures provided by ESTA has already been achieved. The absence of prejudice caused by the manner in which the application was served is common cause. To advance the failure to observe the letter of the law as ground for appeal under these circumstances amounts to a *mala fide* reliance upon of the right to due process, resulting in a

perversion of the law, comparable to an abuse of the process. Applicants did not even attempt to show that the result of the proceedings in the court a quo would or could in any way have been different if service of the application had strictly complied with the dictates of statute and Form. They do not allege that any prejudice was suffered – after all, they appointed an attorney well-known for his not infrequent appearance in this court and filed an affidavit with his assistance, taking all available legal points during the hearing before the court a *quo*.

13. It is in any event clear that there was substantial compliance with the statutory provisions relating to the need to inform an occupier of an impending application to evict him or her. As was said in *Liebenberg NO & Others v Bergrivier Municipality* 2013 (5) SA 246 (CC) at 254F – 255 E:

> *[23] In Unlawful Occupiers, School Site v City of Johannesburg, the Supreme Court of Appeal stated:*
>
> > *"[I]t is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved".*
>
> *[24] This was amplified by the Supreme Court of Appeal in Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association & Others where it was stated:*
>
> > *"It is important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality. . . . To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it."*
>
> *[25] In African Christian Democratic Party v Electoral Commission and Others, this Court, in the context of assessing a local authority's compliance with municipal electoral legislation, held that "[a] narrowly textual and legalistic approach is to be avoided".[17] Rather, the question is whether the steps taken by the local authority are effective when measured against the object of the Legislature, which is ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular.*

[26] Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.'

14. To grant leave to appeal against the factual background of this application would cause a fundamental injustice to the applicant. The respondents can not be said to have been prejudiced by the manner of service against the factual matrix of this case.

15. Leave to appeal must therefore be refused, as another court would not come to a different conclusion on the merits.

16. The court raised the question during argument whether it should grant leave to appeal in respect of the service that was accepted as sufficient or substantially fair by the court. The possibility of an appeal to the SCA was considered and the parties kindly prepared further written argument on the issue, for which the Court is grateful. Upon further consideration, however, it is clear that the appeal must lie to this court, if leave were to be granted. In the light of the aforegoing considerations, however, the application for leave to appeal must be dismissed.

17. The following order is therefore made:

1. The application for leave to appeal is dismissed;
2. The applicants in these proceedings, the respondents in the principal application, are ordered to vacate the applicant's premises on or before the 30th November 2014, which period appears to be reasonable seen against the background of this case;

3. Should the respondents in the principal matter fail to vacate the applicant's property by the 30th November 2014, the messenger of the court is authorised to evict the respondents in the principal matter on the 3rd December 2014, and the SAPS is requested and ordered to assist the messenger to evict the respondents, if such assistance is necessary in the opinion of the messenger.

Signed at Pretoria on this 3rd day of November 2014.

E BERTELSMANN

Judge of the Land Claims Court

Counsel for the applicant:

Jurgen J Rysbergen

Instructed by

Leidig Atttorneys

13 Long Street

Riebeeck West

7306

Tel 022 4612190

Counsel for respondents:

J Hathorn

Instructed by:

JD van der Merwe Attorneys

Doornbosch Centre

Strand Street (R44)

Stellenbosch

Tel 021 886 4956