IN THE HIGH COURT OF CAPE TOWN

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A141/06
A142/06
A143/06

In the matter between:

SIMONSIG LANDGOED (EDMS) BPK Appellant

And

SALOME VERS 1st Respondent

CM ROSSOUW 2nd Respondent

ANNIE MOOS 3rd Respondent

And

KAAPSE WYNLAND DISTRIKMUNISIPALITEIT 4th Respondent

JUDGMENT: 9/05/007

VAN REENEN et NDITA, JJ:

1] This is an appeal against decisions of the magistrate of Stellenbosch in applications for the ejectment of the

respondents from the farm Simonsig Estate which in the records of the Deeds Office is described as "a portion of the farm Koelenhof No 66" (the property) in terms of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (Pie).

2] The appellant is the registered owner of the property.

3] The first respondent is the survivor of the permanent conjugal relationship in conformity with the common law definition of marriage (See: **Fourie and Another v Minister of Home Affairs and Others** 2005(3) SA 429 (SCA) at 463 paragraphs 83 and 84) with Mr Richard Ntoyakhe who passed away on 8 September 2002.

4] The second respondent is the widow of Mr George Rossouw who passed away on 23 November 2002 and to whom she had been married by civil law.

5] Advocate Brown appeared for the appellant and Advocate Moller represented the first- and second respondents.

6] The third respondent has passed away on a date which is not apparent from the papers. As no application has been brought for the substitution of an executor as the applicant in her stead in the appeal under Case No A143/2006 it has been automatically stayed by virtue of the provisions of Magistrate's Court Rule 52(3). Accordingly the appeal brought in the third respondent's name cannot be dealt with at this juncture.

7] Mr Ntoyakhe and Mr Rossouw were employed by the appellant. In terms of their contracts of employment the former was entitled to occupy cottage number DH25 and the latter cottage S11 on the property, by virtue of agreements styled "Huisvestings-ooreenkoms" entered into on 23 November 2002 and 19 June 2003

respectively which set out the conditions under which they and their dependants were permitted to occupy such cottages. As such they undoubtedly were occupiers as defined in Section 1 of the Extension of Security of Tenure Act 62 of 1997 (Esta).

8] The first- and second respondents, prior to the death of their partner and husband respectively resided in their cottages by virtue of the provisions of clauses 1 and 2 of written agreements entered into by them with the appellant which provided as follows:

> "1] Huisvesting sal deel vorm van die werknemer hierbo genoem se vergoedingspakket, solank die werknmer in diens van die werkgewer is en daar verblyf besikikbaar is.
>
> 2] Die huis mag alleen deur die werknemer self, sy/haar eggenoot en hul eie kinders jonger as 18 jaar of persone goedgekeur deur bestuur, bewoon word.
>
> Die volgende persone word gemagtig om in die huis te woon:…"

9] In the case of Mr Ntoyakhe the first respondent and their dependants were so authorised and in the case of Mr Rossouw the second respondent and their dependants. Clauses 1 and 2 of the

written agreements were clearly intended to give effect to the provisions of Section 6(2)(d) of Esta in terms whereof occupiers, such as Mr Ntoyakhe and Mr Rossouw, have the right to family life in accordance with the cultures of their families.

10] The appellant had the following written notice, dated 18 June 2003, delivered by hand to the first respondent on 20 March 2003:

> "ONTRUIMING VAN HUIS
>
> "By die afsterwe van 'n okkupeerder kan die verblyfreg van die okkupeerder se gade of afhanklike beëindig word deur 12 maande skriftelike kennisgewing om die grond te ontruim." Hierdie kennisgewing verwys na die Wet op die Uitbreiding van Sekerheid en Verblyfreg, Art. 8(5).

Wyle Richard Ntoyakhe was die amptelike okkupeerder van die huis en u het verblyfsreg geniet op grond van u verbintenis aan hom. U is 'n tydelike of seisoenwerker by Simonsig en is dus nie outomaties geregtig op verblyf nie.

As gevolg van omstandighede op die plaas, word die huis wat u tans in woon, benodig vir persone wat permanente poste op die plaas het en huisvesting as 'n byvoordeel geniet.

Hierdie skrywe dien as ‘n amptelike 12 maande kennisgewing dat u die huis waarin u tans woon, moet ontruim. U verblyfreg op Simonsig verstryk dus amptelik op 9 September 2003. Indien u teen hierdie datum nie die huis ontruim het nie, kan verdere regstappe teen u geneem word.

U word uitgenooi om asseblief die aangeleentheid so spoedig moontlik met Mnr. Francois Malan te bespreek.”

11] The statement that the respondent had to vacate the cottage on 9 September 2003 was an obvious mistake in that it is irreconcilable with other statements therein from which it appears that the appellant recognised that a twelve calendar months’ period of notice had to be given. The appellant’s attorneys of record, in addition, procured the service on the first respondent by the sheriff on 22 October 2003 and 27 October 2004 respectively, of notices in terms whereof she was required to vacate the cottage on 31 March 2004 and

within 14 days of 27 October 2004 respectively, failing which, an order for the eviction of her and her family would be sought.

12] The appellant had the following written notice dated 18 June 2003 delivered by hand to the second respondent on 19 June 2003:

> "ONTRUIMING VAN HUIS
>
> "By die afsterwe van 'n okkupeerder kan die verblyfreg van die okkupeerder se gade of afhanklike beëindig word deur 12 maande skriftelike kennisgewing om die grond te ontruim." Hierdie kennisgewing verwys na die Wet op die Uitbreiding van Sekerheid en Verblyfreg, Art. 8(5).

U werk nie op Simonsig nie en is dus nie outomaties geregtig op verblyf nie.

As gevolg van veranderde omstandighede op die plaas, word die huis wat u tans in woon, benodig vir persone wat wel op die plaas werk en huisvesting as 'n byvoordeel geniet.

Hierdie skrywe dien as 'n amptelike 12 maande kennisgewing dat u die huis waarin u tans woon, moet ontruim. U verblyfreg op Simonsig verstryk dus amptelik op 18 Junie 2004. Indien u teen hierdie datum nie die huis ontruim het nie, kan verdere regstappe teen u geneem word.

U word uitgenooi om asseblief die aangeleentheid so spoedig moontlik met Mnr Francois Malan te bespreek."

13] The appellant's attorney of record in

addition had two further notices served by the sheriff on the second respondent on 22 October 2003 and 30 November 2004 respectively, in terms whereof she was required to vacate the cottage occupied by her on 18 June 2004 and within 14 days of 30 November 2004, respectively failing which, an application for the eviction of her and her family would be brought.

14] The appellant, contending that the first- and second respondents had become unlawful occupiers as defined in Pie because they failed to vacate their respective cottages as required by the written notices which had been given in terms of Section 8(5) of Esta, instituted proceedings for their ejectment in the magistrates' court of Stellenbosch in terms of the provisions of the former act.

15] The said applications were unsuccessful because the magistrate came to the conclusion that the provisions of Pie could not be utilised to procure the ejectment of occupiers of farms and that the provisions

of Esta found application. It is the correctness of that finding which is the focal point of this appeal.

16] The attitude adopted by the appellant, as regards the appropriate procedure to be employed for the ejectment of the first- and second respondents, is articulated as follows in the affidavit of Mr Francois Jacques Malan one of its directors:

> "Eerste Respondent het geen toestemming gekry van Applikant of enige persoon in diens van Applikant om sodanige toestemming te gee om die huis in eie reg te okkuppeer nie.
>
> Eerste Respondent het nog nooit enige vorm van dienskontrak, huurkontrak of behuisingskontrak gesluit met die Applikant wat aan haar die reg sou verleen om in eie reg die huis op die plaas te okkupeer nie.
>
> Eerste Respondent is nie 'n okkupeerder in terme van die Wet op Uitbreiding van Sekerheid van Verblyfreg, 62 van 1997 nie aangesien sy nooit toestemming, hetsy uitdruklik of stilswyend, of enige ander reg gehad het om die Applikant se grond te okkupeer nie …"

17] The correctness of the factual averments contained in Mr Malan's affidavit has not been challenged by the first- and second respondents who have failed to deliver and file opposing papers and accordingly, such

averments have to be accepted as correct. In the premises Mr Moller's submission that the first- and second respondents occupied their respective cottages, prior and/or subsequent to Mr Ntoyakhe's and Mr Rossouw's deaths, with the appellant's explicit alternatively, tacit consent cannot be upheld due to the absence of a proper factual basis.

18] Gildenhuys AJ in **Landbounavorsingsraad v Klaasen** 2005(3) SA 410 (LLC), at 425 A – B, held that the concept "occupier" in Esta is used in two senses. The first is a narrow one which encompasses only those who are or were parties to a consent agreement with the owner or the person in charge of the land **or** those who have "another

right in law" to reside thereon. The second is a wide one which encompasses those who derive their right of residence through or under occupiers in the narrow sense and that, unlike those in the first group, those in the second group fall outside of the definition of "occupier" in Esta (Also see: **Venter NO v Claasen en Andere** 2001(1) SA 720 LLC at 726 B).

19] The entitlement of the first- and second respondents and their dependants to reside in their respective cottages was derived from the status of their partner and husband respectively as employees of the appellant and not from consent originating in any agreement entered into by them with the appellant or by operation of law (See: **Venter N.O. v Claasen en Andere** (supra) at 726 E – 727 A). In the case of the first respondent she occupied cottage number DH25 as the conjugal partner of Mr Ntoyakhe and the mother of his children because he was entitled to permit her and her children to do so in terms of his contract with the appellant. The second respondent occupied cottage number

S11 pursuant to a **sui generis** right to occupy the matrimonial home which had been provided by Mr Groenewald and flowed from their marriage relationship (See: **Landbounavorsingsraad v Klaassen** (supra) at 421 A – B) and terminated upon his death. In the circumstances the first- and second respondents, prior to the deaths of Mr Ntoyakhe and Mr Groenewald, fell within the wider meaning of occupier and accordingly were excluded from the definition of occupier in Esta.

20] The first- and second respondents' derivative rights of occupation came to an end on the deaths of Mr Ntoyakhe and Mr Groenewald respectively. In the case of the first respondent because the person from whom she derived her right of occupation had passed away and in the case of the second respondent because the marriage relationship from which her right of occupation flowed had come to an end upon the death of her husband (See: **Dique NO v Van**

der Merwe en Andere 2001(3) SA 1006 (T) at 1011 E – D).

21] Section 8(5) of Esta provides as follows:

> "On the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10(1)."

It is not possible to determine from the papers that have been placed before this court whether Mr Ntoyakhe and Mr Groenewald were employees as contemplated in subsection 8(4) ie. that they had resided on the property for longer then 10 years; had reached the age of 60 years; or had been unable to supply their labour as a result of ill health, injury or disability; or

that they had committed any of the breaches contemplated in subsection 10(1). That they in fact were occupiers as contemplated in subsection 8(4) was not only impliedly accepted by the appellant as is apparent from the 12 calender months' written notices given to them but can be inferred from the fact that it has not been placed in issue that the provisions of subsection 8(5) applied to them.

Assuming that the legislature in that subsection used the concept spouse in its ordinary every day sense of a married person in relation to his/her wife/husband (Shorter Oxford English Dictionary, sv "spouse") the second respondent undoubtedly enjoyed the benefit of 12 calender months' written

notice under that subsection. The first respondent, despite the fact that the appellant referred to her as Mr Ntoyakhe's "gade" in the written notice in paragraph 10 above, does not appear to have qualified as a spouse in that sense. She however, would have been entitled to the benefit of the beneficial provisions thereof if she qualified as a dependant of Mr Ntoyakhe in the sense of "a person who depends on another for support" (The Shorter Oxford English Dictionary, sv "dependent"). The probability that she was so dependent is strengthened by Mr Malan's statement that she has never been employed by the appellant and the fact that the appellant, by having given her 12 calender months' written

notice, appears to have accepted that the provisions of subsection 8(5) of Esta found application. That conclusion obviates the need to decide whether the concept "spouse" in that subsection, as was done by the majority in **Daniels v Campbell NO and Others** 2004(5) 331 (CC) at 341 E to 349 G, should by means of a constitutionally interpretive approach be assigned a broader meaning so as to include also permanent conjugal partnerships between unmarried heterosexuals.

21] That the notices required by subsection 8(5) of Esta were duly given and that the required 12 calender months' written notices have expired have not been placed in issue in these

proceedings.

22] What was the legal the status of the first- and second respondents' occupation in the period after the deaths of Mr Ntoyakhe and Mr Groenewald and before the prescribed 12 calender months' written notices expired? Because of the absence of any express or tacit consent on the part of the appellant as a basis for the continuation of their rights of residence - the giving of the notices of termination to them by the appellant were irreconcilable with such consent having been given - the first- and second respondents clearly were not occupiers under Esta by virtue of any consent. Could the legal character of

the first- and second respondents' right of residence during that period be equated to "another right in law to do so" within the meaning thereof in the definition of "occupier" in Esta? That phrase has not been defined in Esta and Gildenhuys JA in **Landbounavorsingsraad v Klaasen** (supra) at 419 B, observed that it is difficult to envisage what the legislature contemplated in employing it. The meaning of that phrase has, as far as we could ascertain, been considered in only one decided case namely **Agrico Masjinerie (Edms) Bpk v Hendrina Swiers**, Case No A31/04, an unreported decision of a full bench of this division handed down on 20 April 2006, in which it was held that such

residual interests as were retained by an occupier who had vacated land pursuant to a void waiver of the right of occupation in conflict with the express provisions of Section 25(1) of Esta, amounted to “another right in law” within the meaning thereof in the definition of “occupier” in Esta.

23] In the absence of any statutory definition or an exhaustive judicial interpretation thereof the meaning of the phrase “another right in law to do so” must be determined with reference to the ordinary dictionary meanings of the words used. As already stated, the first- and second respondents by virtue of the provisions of Section 8(5), upon the deaths of Mr Ntoyakhe and Mr

Groenewald, were entitled to continue residing in their respective cottages until a notice period of 12 calender months had elapsed. The appellant in turn - other than that he was entitled to issue notices terminating the first- and second respondent's rights of residence - was obliged to permit them to exercise such rights. It appears to me to be axiomatic that such protection as the first- and second respondents' rights of residence enjoyed, in terms of the provisions of Section 8(5) of Esta, originated from a law, in that it provided a totally new basis for the exercise of their continued rights of residence. The possibility that such a right might be encompassed in the concept "another

right in law to do so" was articulated by Gildenhuys AJ in **Landbounavorsingsraad (**supra) 419 footnote 22).

24] Is the nature of the rights of residence that flow from the provisions of Section 8(5) of Esta such that they fall within the meaning of the concept "right" in the phrase "another **right** in law to do so"? That concept is in the **Shorter Oxford English Dictionary on Historical Principles** (3ed by CT Onions) defined as "justifiable claim, on legal [or moral grounds], to have or obtain something, or to act in a certain way" and "a legal, [equitable, or moral] title or claim to the possession of property or authority,

the enjoyment of privileges or immunities, etc. (The words in square brackets are clearly inapposite if those definitions are applied in a legal setting). Coetzee J (with whom Nicholas and FS Steyn JJ agreed) in **Secretary for Inland Revenue v Kirsch** 1978 (3) SA 93 (T) at 94 D – F, said the following when dealing with the meaning of the concept "right" in section 8A of the Income Tax Act 58 of 1962:

> "Legal terms used in a statute generally bear the same meaning as in common law (**Kleynhans v Yorkshire Insurance Co Ltd** 1957 (3) SA 544 (A) at 551 – 2) and must be read in that sense. The word 'right', in legal parlance, is not necessarily synonymous with the concept of a 'legal right' which is the correlative of duty or obligation. On the contrary, legal literature abounds with 'right' being used in a much wider sense and, as is pointed out in **Salmond on Jurisprudence**

> **II** ed at 270, in a laxer sense to include any legally recognised interest whether it corresponds to a legal duty or not. An owner, for instance, has at common law the right to use or abuse his property …
> There are many cases in which 'right' when used in a statute has been interpreted in the wider sense"

25] An ineluctable consequence of the recognition by Section 8(5) of Esta of the first- and second respondents' continued rights of residence pending the expiration of a written notice period of 12 calender months is the existence of a correlative obligation on the part of the appellant, admittedly of only a limited duration, to respect the exercise of such rights, failing which, compliance could be compelled by a court of law. In the premises such rights as flow from the provisions of Section 8(5) of Esta, in

our view, constitute a legal right in the narrow (See: **Agrico Masjienerie (Edms) Bpk v Swiers** (supra) at pages 58 – 59) alternatively, in a wider sense, in that the respondents' rights of residence constitute at least a "legally recognised interest" (per Coetzee J in **Secretary for Inland Revenue v Kirsch** (supra)).

26] It follows that we incline to the view that the first- and second respondents' rights of residence during the period following upon the deaths of Mr Ntoyakhe and Mr Rossouw until the expiry of the notice period of 12 calender months, constituted occupation in terms of "another right in law to do so" within the meaning thereof in the definition of occupier in Esta. The fact that the first- and second respondents had theretofore occupied their respective cottages as the conjugal partner and wife respectively of employees of the appellant and not as occupiers in their own right does not, in our view, stand in the way of a finding that they subsequently did so in their own

right as they then exercised their rights of residence in a totally different capacity.

27] That the first- and second respondents' occupation of their respective cottages became unlawful the moment the notice period of 12 calender months expired is beyond doubt (See: **Mkangeli and Others v Joubert and Others** 2002(4) SA 36 (SCA) at 43 I; **Land- en Landbou Ontwikkelingsbank van Suid-Afrika v Conradie** 2005(4) SA 506 (SCA) at 514 F – G). Whether they then became unlawful occupiers as defined in Section 1 of Pie is a different matter. An unlawful occupier is in Pie defined as meaning "a person who occupies land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security Act,

1997 and excluding … ” (the further exclusion is not relevant for the purposes of this judgment and the underlining has been provided). If the concept “occupier” in the underlined phrase were to be construed as referring to a person still qualifying as an occupier under Esta its effect would be to render the first exclusion meaningless or otiose as a person can be an occupier for the purposes of Esta only if he or she resides on land belonging to another pursuant to consent or another right in law to do so and accordingly, would automatically be excluded from such definition which requires an absence of such consent or right. It is a cardinal rule of construction of statutory enactments

that the plain meaning of words used therein must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly (See: **Bhyat v Commissioner for Immigration** 1932 AD 125 at 129; also see: **Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk** 1994(3) SA 407 (A) at 422 A - C).

Schutz JA in **Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape** 2001(3) SA 582 (SCA) at 587 E – F said that the effect of the formulation of the above principle by Stratford JA in Bhyat's case is that:

> "… the court does not impose its notion of what is absurd on the legislature's judgment as to what is fitting, but uses absurdity as a means of divining what the legislature could not have

> intended and therefore did not intend, thus arriving at what it did actually intend."

As, in our view, it is inconceivable that the legislature could have intended the absurdity that the first exclusion in the definition of unlawful occupier would be purposeless, we incline to the view that the true intention of the legislature in using the concept "occupier" therein was to refer to any person who had earlier, but no longer, enjoyed the status of an occupier in terms of Esta. That conclusion is not only consonant with the provisions of Section 9(1) of Esta which provides that an occupier "notwithstanding the provisions of any other law … may be evicted only in terms of an order of court issued under

this Act" but also the following view expressed by Olivier JA in a minority judgment in **Bekker and Another v Jika: Ndlovu v Ngcobo** 2003(1) SA 113 (SCA) at 146 B – D:

> "In my view, the exclusion in PIE of the application of ESTA is a strong indication in favour of the more limited ambit of PIE. It is clear that the Legislature wished to avoid any overlap between the two statutes. …… But, be that as it may, the net result is that PIE excludes a person who has or at a certain time had consent or another right to occupy the land of another. PIE does not apply to them."

It is also consonant with the presumption, espoused by Gutsche J in **Rex v Gwantshu** 1931 EDL 29 and Gildenhuys AJ in the unreported case of **Kusa Kusa CC v Mbele** (LCC 39/2002) to the effect that a subsequent general enactment is not intended to interfere

with an earlier special provision unless such an intention is clearly manifested.

28] In view of the aforegoing we have come to the conclusion that after expiration of the notices in terms of Section 8(5) of Esta, the status of the first- and second respondents was not that of unlawful occupiers in terms of the definition thereof in Pie and that the magistrate was correct in having come to the conclusion that the provisions of Esta found application and not those of Pie.

29] Accordingly the appeal is dismissed with costs.

D. VAN REENEN **T. NDITA**

IN THE HIGH COURT OF CAPE TOWN