REPORTABLE

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: A777/2010

In the matter between:

NEDERBURG WINE FARMS	**Appellant**
And	
PIET BESTER	**First Respondent**
RENEE BESTER	**Second Respondent**
MIRIAM HERMANUS	**Third Respondent**
DRAKENSTEIN LOCAL MUNICIPALITY	**Fourth Respondent**

JUDGMENT DELIVERED ON 10 AUGUST 2011

MANTAME, AJ

[1] This is an appeal against the refusal of an eviction order sought by the Appellant in terms of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998, herein referred to as "PIE". The appeal emanates from the decision of Magistrate Naik handed down at Paarl Magistrates' Court on the 23 June 2010 dismissing the eviction application.

[2] Appellant was represented by Mr. Wilkin and there was no appearance for the Respondents.

[3] The common cause facts are that First, Second and Third Respondents lived on the Appellant's farm from when all of them were under the age of 10. They lived on the farm by virtue of being dependants to their parents both of whom were labourers on the said farm. This means therefore that Labourers' House No.21 Farm 1509, Plaisir de Merle, Paarl was regarded by the First to Third Respondents as their communal home since they lived there for the past 27 years and with their parents whilst they still survived.

[4] First to Third Respondents occupied the Labourer's House by virtue of the right of occupation of their now deceased parents. Firstly, it was their farther, Piet Bester (Snr), who was employed on the farm as a tractor driver in 1984 and he came to live on the farm with his entire family. After his death in the year 2000, the right of occupation was extended to his wife, Maria Bester, who died in the year 2006.

[5] On the 13th September 2006, First to Third Respondents were given notices to vacate the property within three months and further notification was given on the 11 June 2008. First to Third Respondents have not vacated the Labourers' House to date. On both notices given, First to Third Respondents were advised that the permission to occupy the house lapsed with the death of

their mother, Maria Bester whose right of residence was as a result of her service contract with Appellant. Since the right of occupation of First to Third Respondent's mother has lapsed, they are now "unlawful occupiers" hence the eviction application is brought in terms of PIE Act.

[6] Appellant now appeals to this court to set aside the findings of the magistrate and that an eviction order be issued against First to Third Respondents.

[7] Appellant issued a notice of motion on the 8 October 2009, for the eviction of First to Third Respondents at the Paarl Magistrate Court.

[8] On the 6 April 2010, First to Third Respondents filed their affidavits opposing the eviction application. At the time of the opposition of this eviction application the Respondents were 37, 27 and 34 years respectively.

[9] First to Third Respondents contended in the court *a quo* that both their parents who died were "occupiers" in terms of the Extension of Security of Tenure Act 62 of 1997. At all material times that they were living on the farm, appellant was always aware of their existence; and they received their right of occupation through their parents.

[10] Further, First to Third Respondents disputed the fact that they are illegal occupiers in terms of Prevention of Illegal Eviction from an Unlawful Occupation of Land Act No 19 of 1998.

[11] Further argument in that court was that, even the notices that were served on them, should have been brought in terms of Section 8(5) of the Extension of Security of Tenure Act 62 of 1997, as they have been afforded protection of their rights in terms of ESTA.

[12] First to Third Respondents conceded that they are not working for the Appellant. Though Second and Third Respondents are said to have been working for A J Hendrikse and earn about R335.00 per week, it is not before this court whether First Respondent is currently gainfully employed as he resigned his last job with Mr Valentyn on the 18th December 2009. Further submission was that with this income that the Second and Third Respondent are earning, it would be difficult for them to afford an alternative accommodation.

[13] Applicants have argued that First to Third Respondents have not advised what steps they had taken to secure alternative accommodation. They merely stated that they have not secured same.

[14] In the court *a quo*, they even cited that what makes the situation even more strenuous is the fact that the Second and Third Respondents have three

and two minor children respectively, and three of them attend Simondium Primary School and the other child attends the Kylemore Secondary School. Given the aforementioned set of circumstances if the eviction is granted, they will suffer negatively.

[15] The application was heard by the court *a quo* and judgment was handed down on the 23 June 2010 dismissing the eviction application. Appellant therefore requested written judgment with reasons on the 5 July 2010, in terms of Rule 51 (1) to which the magistrate responded in writing.

[16] Appellants filed their leave to appeal on the 20 October 2010 against the whole of the undated written judgment of Magistrate Naik on the basis that the magistrate erred by finding on the following:

16.1 that First to Third Respondents were dependants as defined in Section 8(5) of the Extension of Security of Tenure Act 62 of 1997 in that;

16.2 that Appellant has to give them twelve(12) months written notice to vacate the house, in terms of Section 8 (5);

16.3 that the conditions of Act 62 of 1997 do apply;

16.4 that the erred in not determining that the conditions of the Act 19 of 1998 are applicable;

16.5 that he erred in not granting the costs to the Appellant.

[17] Appellant argued that First to Third Respondents are not 'occupiers' as defined in the provisions of Extension of Security of Tenure Act 62 of 1997. If they wanted to rely on the protection afforded by the provisions of section 8(5) then it was incumbent upon them to allege and prove that they and their mother fell within the definition as stipulated in the Extension of Security of Tenure Act 62 of 1997.

[18] Furthermore, Appellant argued that even the notices of eviction that were served on the Respondents, they were served in terms of common law and not in terms of any of the above legislation.

[19] Mr. Wilken submitted that even if the provisions of the Extension of Security of Tenure Act were to apply, Respondents have not alleged that their mother had reached the age of 60 years before she died. They had not alleged either that they were dependants in terms of Section 8(4) and (5) of ESTA.

[20] It is trite law that eviction should be regulated in a lawful, dignified and humane manner. As such there are pieces of legislation that are in place to give effect to such regulation. In the court *a quo*, the Appellant argued that the PIE Act is applicable in this regard and the First to Third Respondents argued that the ESTA is the applicable legislation.

[21] What is very much distinct in these proceedings is the fact that First to Third Respondents lived in this Labourers House from as young as under 10 years of age. In contrast to that Appellant in turn, regard Respondents as "unlawful occupiers" in terms of the PIE Act. In terms of this Act, an "unlawful occupier" is defined as follows:-

> ***"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 of Tenure Act, 1997 and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act".***

[22] It is common cause fact that First to Third Respondents have lived in the house for the past 27 years. They have not mushroomed from nowhere as suggested in the aforementioned definition. If one had to interpret this definition above, it does not fit the situation that the Respondents are on currently. I am inclined to agree with the First to Third Respondents' argument in the court *a quo* that they receive their protection in terms of Section 8(4) of ESTA. It was incumbent upon the Appellant to find a humane and dignified way of dealing with this eviction that fits squarely within the confines of UBUNTU. First to Third Respondents did not come from nowhere to invade Appellants property.

[23] The Extension of Security of Tenure Act 62 of 1997 in its very nature is to provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the condition of residence on certain land; to regulate the condition 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.

[24] I am not persuaded by Appellant's argument that Respondents have not alleged that they are "dependants" in terms of section 8(5). The fact that they are alleged in the court *a quo* that they received their protection in terms of Section 8(5) is an all encompassing situation. If one reads the provisions of that Section, one would come to the conclusion that they received their protection by virtue of their parents being" occupiers" in terms of ESTA. It is difficult to comprehend that after both parents died, Appellant still regard the fact that they were "long-term occupiers" as presumed.

[25] The attitude of the Appellant in this case is unfortunate. Parliament in its wisdom enacted the provisions of ESTA in order to protect the rights and dignity of those who fall prey to eviction. For the Appellant not to have taken into account the standard of living of the First to Third Respondents and the fact that they have lived in the said Labourers House almost for the rest of their lives is unfortunate. In societies where people live in abject poverty, like in this instance,

farm dwellers, it is not uncommon for the members of the family to live communally in one household, notwithstanding their age group and be depended on their parents up until, in certain instances, they receive an old age grant. This is due to the farm culture and orientation that farm dwellers are brought up with.

[26] Surely "dependants" of a person who had a valid title under the ESTA are entitled to eviction notices and protection under the ESTA. UBUNTU which is one of the principal pillars of our constitution requires that such "dependants" be treated with dignity and respect, particularly where they had lived for so long on the farm and where their parents died whilst employed on such farm. Accordingly, it is my judgment that Respondents are entitled to 12 months notice under ESTA.

[27] In turn, Section 26 of the Constitution of the Republic of South Africa, gives right to every South African citizen to have adequate housing and that no one may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances.

[28] It is so unfortunate that until this day, there is no authority on this issue. In my view, the magistrate did not err or misdirect himself when he refused the eviction order and found that they never became occupiers in their own right, but enjoyed protection though in terms of section 8(5) Act 62 of 1997 as they are "dependants" of the deceased. He then found that they were entitled to twelve

months notice. In turn the issue of the award of costs is discretionary and therefore cannot interfere with what has been awarded by the court *a quo*.

[29] Section 10(3) of the Act 62 of 1997 is very much specific for purposes of these proceedings in so far as to which orders the court has to grant in evictions in terms of this Act.

[30] Mr. Wilkin argued that the notices to vacate within three months were given in terms of common law and Respondents did not comply with those notices. They continued to occupy the house unlawfully for a period of 44 months.

[31] I accordingly remain unconvinced, given the fact that the process of eviction is a regulated one. Why in the first place the Appellant chose to give notices in terms of the common law and thereafter proceeded with eviction in terms of PIE Act?

[32] In the light of the conclusion to which I have come, it is not necessary to deal with other arguments advanced by Mr Wilkin. Further, I am of the view that First to Third Respondents do meet the requirements in terms of Section 8(5) of ESTA. I have no doubt in my mind that they are dependants.

[33] I therefore make the following order:

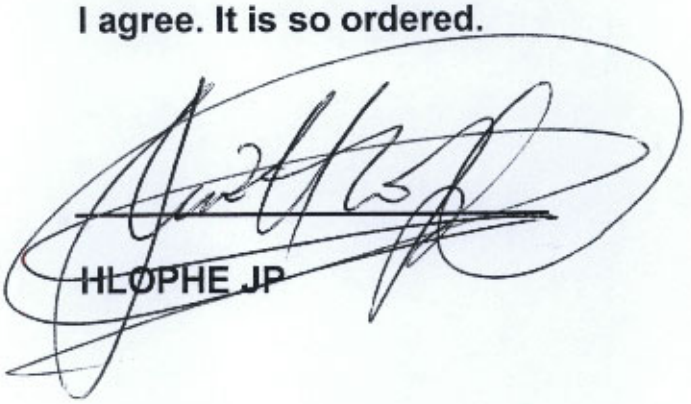
33.1 The Appeal is dismissed;

33.2 Appellant has to take into account the provisions of ESTA when evicting First and Third Respondents and is therefore required to give them written notice of 12 months to vacate the Labourers house in terms of the provisions of Section 8(5) of Act 62 of 1997;

33.3 There shall be no order as to costs.

MANTAME A J

I agree. It is so ordered.



HLOPHE JP