IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A362/2018

In the matter between:

ARMIEN HENDRICKS	1st Appellant
PORTA HENDRICKS	2nd Appellant
and	
DARMANE INVESTMENTS (PTY) LTD	1st Respondent
STELLENBOSCH MUNICIPALITY	2nd Respondent

JUDGMENT: 30 AUGUST 2019

BOZALEK, J and WILLE, J:

[1] This is an appeal against the granting of an order for the eviction[1] of the first and second appellant in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998[2], leave to appeal having been granted by the Supreme Court Appeal on 21 August 2018.

[2] The appellants are Mr and Mrs Hendricks who reside in the property together with their children.

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[1] The "order"

[2] The Act ("PIE")

[3] The first respondent is a private company trading under the name of Darmane Investments (Pty) Limited[3]. The second respondent is Stellenbosch Municipality [4]which elected not to participate in the appeal.

[4] The subject property is a farm consisting of three adjoining portions of land, now operated as a commercial enterprise by the first respondent. The farm is known as Nooitgedacht.[5]

[5] In this court the appellants were represented by Mr Budlender SC together with Ms Adhikari and the first respondent by Ms Gassner SC together with Mr Wilken.

[6] The primary ground of appeal advanced on behalf of the appellants is that the first respondent's "termination" of the appellants' rights of residence and occupation, as formulated in the first respondent's founding affidavit was legally of no cause or effect.

[7] It is further contended that the appellants' rights to occupy the property had not been lawfully terminated and accordingly they were not unlawful occupiers of the property when the eviction application was launched. It was further submitted that the founding affidavit did not properly engage with the issue of an implicit notice of termination of the appellants' precarium, as was ultimately contended for on behalf of the first respondent. A further ground of appeal was that the court *a quo* erred in failing to engage with the antecedent issue of whether an eviction order would be just and equitable, taking into account, *inter alia*, that no order was issued out

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[3] Darmane

[4] The "Municipality"

[5] The "property"

against the second respondent (Stellenbosch Municipality) compelling it to provide emergency accommodation to the appellants in those circumstances, before it dealt with the issue of the effective date of an eviction order.

[8] Finally, it was contended that section 4(5)(c) of the Act had not been complied with, to the extent that the first respondent's notice was invalid, as it had neglected to set out any valid grounds for the appellants eviction in the said notice.[6] Seen from a wider perspective, this ground embraced the issue of whether termination of a precarium requires *"good cause."*

[9] First respondent's case was underpinned by the averment that during January 2017, due to adverse economic circumstances, it had decided to terminate the first appellant's precarious right to occupy the property but that the latter would first be offered an opportunity to lease it. When first appellant refused to enter into an lease agreement the first respondent, on 3 February 2017, called upon him to vacate the property by 31 March, and having failed to do so, was, together with his wife, in unlawful occupation.

[10] First respondent purchased the property from Rustenburg[7], during February 2013. At the time of transfer into the name of first respondent, the appellants had been resident in a cottage[8] situated on the property. First appellant, in particular, had resided on the property, together with his parents, since birth.

[11] It is further alleged by first respondent that, during or about 2010, a duly authorized representative of the predecessor of first respondent entered into an oral

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[6] The eviction notice in terms of section 4(2) dated the 26th of April 2017

[7] Rustenberg Wines (Pty) Ltd

[8] Cottage number three (3)

agreement with first appellant to the effect that he was afforded a *"precarious right"* to occupy cottage number three on the property[9].

[12] It was contended by the first respondent that this right was gratuitous and revocable; that first appellant would be responsible for the care and upkeep of the cottage and that he would be liable for the electricity used at the cottage.

[13] At the time of the oral agreement contended for, neither of the appellants were in the employ of Rustenberg or the first respondent. Both appellants are currently employed elsewhere than on the property.

[14] First respondent takes the position that when it took transfer of the property *"it stepped into the shoes"* of Rustenberg.

[15] By way of a letter dated the 25 January 2017, addressed only to first appellant, he was *"invited"* by first respondent to enter into a formal lease agreement with first respondent. He was told, furthermore, in that letter that he had no *"rights of occupation"* to the premises. Significantly, the lease proposed by first respondent envisaged that first appellant would be required to pay the proposed rental with effect from 1 January 2017 (i.e. retrospectively). Not surprisingly perhaps, first appellant declined the offer.

[16] On 3 February 2017, a further letter was sent to first appellant on behalf of first respondent in which it was recorded that because of his refusal to enter into a formal agreement of lease (and because he had failed to pay the rental proposed by first respondent), he and his wife (and children), were required to vacate the cottage by no later than 31 March 2017.

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[9] In a different cottage on the property

[17] In its founding affidavit first respondent also made allegations that first appellant was involved in the illegal purchase of electricity cards on behalf of the Nooitgedacht farm and that it had thereafter preferred criminal charges against him in this regard. These allegations were denied by first appellant and in my view nothing turns up on this dispute.

[18] First appellant was born on Nooitgedacht farm and thus had been resident there for at least the past thirty eight (38) years. He is currently employed on a neighbouring farm as a foreman. His place of employment is in close proximity to his place of residence.

[19] Further relevant circumstances are that the appellants live together with their two minor children who are aged two (2) and three (3) years old. Second appellant is employed in Somerset West, about ten (10) kilometres away, in a restaurant. First appellant's mother (the grandmother to his minor children) also resides in a neighbouring cottage on the farm. First appellant's father still works on the farm and has done so for most of his life.

[20] In his opposing affidavit first appellant averred that the cottage was gratuitously allocated to him as a wedding present during 2010 by the owner of the farm at the time. However, first appellant did not persist with this case after an affidavit by the previous owner was filed on behalf of first respondent at the reply stage. This was necessary since first appellant had placed in issue that the deponent to the founding affidavit for the proceedings in the court of first instance, was possessed of the necessary personal knowledge to deal with the circumstances surrounding his occupation of the cottage. First appellant's occupation of the cottage arose prior to first respondent's purchase of the farm during 2013.

[21] First appellant also pointed out that first respondent took transfer of the farm in 2013, and only four (4) years later took issue with his occupation of the cottage. His case was that the cottage which he occupied was allocated to him by the then owner of the property, a Mr Barlow[10], represented by his wife.

[22] This allocation was made to first appellant despite the fact that neither of the appellants had ever worked on Nooitgedacht farm. At the time of the said allocation, first appellant's case proceeds, no limitations were placed on the term of his tenure. The cottage was dilapidated and unusable and one of the conditions imposed was that first appellant was to renovate and maintain the cottage.

[23] According to first appellant the cottage was indeed renovated and maintained by him and he and his family had resided there for the past seven (7) years. First appellant avers that his occupation of the cottage was indefinite and not simply revocable at the instance of the grantor on a *"whim"* or *"arbitrarily."*

[24] In addition, first appellant contended that the alleged notice of termination was ineffective *"inter alia"* because his occupancy of the cottage was pursuant to a right to occupy which was not precarious but *"permanent, and not revocable easily or hastily at the instance of the grantor."*

[25] Despite his stance and belief as set out above, first appellant later stated that he was prepared to negotiate a lease with first respondent to occupy the cottage and was still willing to do so.

[26] This *"offer"* however appeared to have be *"stillborn"* in view of the attitude subsequently adopted by first respondent that first appellant had failed to grasp the

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[10] The "2010 agreement"

opportunity of the lease initially and that the *"relationship between the parties is such that no settlement based on your client's extended tenancy would be feasible on the basis of the lease"*[11].

[27] A curious feature of first respondent's case concerns the circumstances which gave rise to the apparently pressing need to evict the appellants. In its founding affidavit it was stated that it was decided to terminate first appellant's precarium in January 2017 *"due to adverse economic circumstances"* in that the appellants were neither employed on the property nor contributing to it as a commercial enterprise. In the same affidavit it was said that all housing on the property was used by the directors' employees and agents of the company, including guest accommodation in the cottages. It was further stated that first respondent was commissioning and developing a cellar on the farm and that once complete the cottages would be used for accommodations for persons visiting the cellar. No indication was given as to when the cellar project might be commenced or completed.

[28] First appellant pointed out in his opposing affidavit that six (6) cottages on the farm were currently vacant. In its replying affidavit first respondent stated no more than that the cottages situated on the farm were used as *"guest accommodation for the employees of the owner"* and it was first respondent's intention to rent out these cottages to guests. In short, first respondent did not make out a strong case for any pressing need to evict the appellants.

[29] In reply, first respondent relied also on the affidavit of Mr Simon Barlow, a director of Rustenberg which had previously owned the Nooitgedacht farm. According to Mr Barlow's affidavit, Nooitgedacht was subdivided and certain portions

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[11] By way of the correspondence dated the 5th of May 2017

of the land was sold to first respondent. During 2008, Rustenberg also disposed of a ten (10) hectare potion of Nooitgedacht to a company controlled by a Mr Merwe Viljoen.

[30] Mr Merwe Viljoen required the services of an employee to look after his farm and he accordingly employed first appellant. Mr Barlow stated that during 2010, Mr Viljoen made a request to him that first appellant (and presumably his family) be allowed to occupy the cottage. The cottage needed renovation and Mr Viljoen offered to assist financially with the costs of such renovation.

[31] Mr Barlow stated that he agreed to the occupation of the cottage by first appellant *"largely as a favour"* to Mr Viljoen and in view of the fact that the said cottage was unoccupied.

[32] A precarium falls to be terminated only on reasonable notice. The occupation of the property by the appellants accordingly remained lawful pending the lawful termination thereof and the lapse of a reasonable time period as set out in an appropriate notice of termination.

[33] Prior to the institution of the eviction proceedings, first respondent or its attorneys directed three letters to one or both appellants, namely, its letters of 25 January, 3 February and 4 April 2017. Certainly, having regard to the first two letters, first respondent is unable to contend for an express termination of the precarium and accordingly advanced the argument that an *"implicit"* termination was effected and that a reasonable period of time was given to the appellants to vacate the property.

[34] On a plain reading thereof the first two letters in no way refer to any precarium right enjoyed by either appellant. In fact, the letter of 25 January 2017 specifically

advised first appellant (alone) that he had *"no rights of occupation in respect of the premises"* and the letter, again to him alone, of 3 February 2017 did not deviate from that position.

[35] Apart from advising first appellant that he enjoyed no right of occupation to the premises, the two letters, taken together, offered first appellant an opportunity to enter into a lease and then, in the light of his failure to respond within the period of nine (9) days, revoked this offer. In addition, the second letter advised that first appellant that he had to vacate the property by 31 March 2017 (i.e. just less than two (2) months ahead).

[36] It should be mentioned that, as authority for implicit termination of the precarium, first respondent placed reliance on the Joe Slovo[12] case. The essence of the reasoning in Joe Slovo was *inter alia*, that the occupiers had enjoyed a precarium pursuant to the owner of the land having granted the occupiers tacit consent to occupy the land. That consent was qualified, however, as it was common cause that the occupiers knew that they would have to leave when the land was needed for the N2 Gateway Project. It was held that the commencement of that project accordingly revoked the tacit consent to occupy. The status of the occupiers had accordingly changed upon that event from being "lawful" occupiers to being "unlawful" occupiers by the stage when the application for eviction was launched.

[37] In the present matter, explicit consent was given to first appellant (and by clear implication to his wife to be) in the form of a precarium for an indefinite period. Further, there was no event or a fulfilment of a condition in the present matter which

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[12] Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae) 2010 (3) SA 454 (CC)

brought to an end the explicit permission to occupy. Joe Slovo is therefore no authority for the argument that there was an implicit termination of the explicit consent granted in the present matter.

[38] In our view, neither the 25 January 2017 nor the 3 February 2017 letters qualify as notice of termination of first appellants' precarium since they were explicitly written on the basis that first appellant enjoyed no right of occupation to the cottage (i.e. a denial of any precarium). In the particular circumstances of this matter, unequivocally notifying first appellant, a precarium habens, that he had no right of occupation to the premises and must vacate them at short notice was incompatible with giving or purporting to give notice of termination of a precarium.

[39] By contrast to its earlier letters, first respondent's (attorneys) letter of 4 April 2017 recognised that first and second appellants had, or laid claim to, a right of occupation of the property. It recorded the purported termination of such rights. But it also recorded first respondent's view that the appellants were in unlawful occupation of the property, presumably by virtue of the notice purportedly given by the two earlier letters. First respondent proceeded to propose discussions on an agreed date when the appellants would vacate the property. Notwithstanding this proposal, first respondent also gave notice in that letter of its intention to launch eviction proceedings against the appellants *"shortly"*. True to its word first respondent commenced such proceedings in the Magistrates Court on or about 26 April 2017 i.e. some three weeks later.

[40] Only the letter from first respondent's attorneys dated 4 April 2017 can be seen as notice of termination of the precarium undoubtedly enjoyed by the

appellants. It follows that, at best for first respondent, the notice given to the appellants of termination of the precarium was some 22 days.

[41] The next issue which arises is whether the notice given was reasonable.

[42] The surrounding factual matrix was that first appellant had lived on the property for the whole of his life (i.e. some 38 years); that the consent given under the precarium was indefinite; that he had been living in the cottage with his wife and two minor children for at least the last seven (7) years and that he had spent considerable time and energy renovating the cottage with the explicit consent of the owner who would, in addition, benefit from such contributions. Other relevant factors were that, as previously discussed, first respondent was unable to make out a pressing case that it required the cottage in question at short notice and/or to meet a pressing need.

[43] The "reasonableness" of the notice period is not only dependent on the facts of each case, but must also be viewed having regard to the constitutional right to human dignity, (section 10), the right to adequate housing (section 26 (1)) and the right not to be evicted from once own home without an order of court (section 26 (2)). Also to be taken into account is our long and fraught history regarding access to, and tenure on, land, particularly agricultural land.

[44] It was argued on behalf of first respondent that it had terminated first appellant's right to occupy the cottage on 3 February 2017. As previously stated, no notice of termination reflecting that first respondent recognised or at least took into account first appellant's right of occupation in terms of the precarium took place until 4 April 2017. When first respondent's application was launched on 28 April 2017, the appellants had been given just more than three (3) weeks' notice to vacate (and

thus to find alternative accommodation). Such a period of notice was, by any standard, utterly unreasonable. In the absence of reasonable notice the appellants remained in lawful occupation of the premises.

[45] Even if we are incorrect that first respondent can place no reliance on its two earlier letters, and thus that the period of notice commenced on 25 January 2017, a notice period of approximately eleven (11) weeks can, in the circumstances of this matter, hardly be regarded as reasonable.

[46] In Mbanje v Ngani[13], the following was stated:

> *"It seems to me that the process initiating action in the court, whether it be by the issue of a writ of summons or notice of motion, has the effect of freezing the rights of the parties at the time that it is filed in the registry. So that, if at the time action was instituted, a right of action had not accrued to the plaintiff or applicant, as the case may be, then no cause of action is established by the initiating process"*

[47] Accordingly when the eviction application was launched, the first respondent did not have a "complete" cause of action against the appellants.

[48] First respondent takes the position that Mrs Hendricks (second appellant) had no independent right to occupy the property and did so solely through her husband. This is not only inconsistent with the findings in the Klaase[14] judgment, but also is inconsistent with the values set out in our Constitution. Second appellant's rights of equality and human dignity are demeaned and diminished when her right of occupation is defined or described in these terms. Second appellant occupied the

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[13] 1988 (2) SA 649 (ZS)

[14] Klaase and Another v Van der Merwe N.O. and Others 2016 (6) SA 131 (CC)

cottage lawfully, with the full consent of the owner. First respondent failed to demonstrate that second appellant's right of occupation had been lawfully terminated or, indeed, terminated at all. None of the letters provide a basis for any termination of her rights and accordingly do not advance an entitlement for an eviction order against her.

[49] On the facts of this case second appellant acquired her own independent right to occupy the cottage, which right was not independently terminated by first respondent at any stage.

[50] In the light of the conclusions which we have reached regarding the form and period of notice to terminate, given or purportedly given by first respondent, it is not necessary to deal with the further arguments raised on behalf of the appellants. These include the issue of whether, in addition to a reasonable period there must also be *"good cause"* for the termination of a precarium and the further issue of whether the court *a quo* misdirected itself in not first considering whether an eviction order would be just and equitable before considering when such order should be made effective.

Costs

[51] Mr Budlender advised that the appellants' legal costs were being paid by the Department of Land Affairs and that in these circumstances the appropriate order should be that there would be no costs order. Taking into account that first respondent also sought no cost order, this appears appropriate.

[52] In the result the following order is made:

1. The appeal is upheld, with no order as to costs.

2. Paragraphs 1 – 5 and 7 – 8 of the orders granted by the court *a quo* on 23 April 2018 are set aside and replaced with the following order *"The application is dismissed, with no order as to costs."*

BOZALEK, J

WILLE, J

I agree.

SAMELA, J