



CONSTITUTIONAL COURT OF SOUTH AFRICA

Yolanda Daniels v Theo Scribante and Another

CCT50/16

Date of judgment: 11 May 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 11 May 2017, at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal concerning whether occupiers under the Extension of Security of Tenure Act 62 of 1997 (ESTA) have a right to make improvements to the property they inhabit without the consent of the landowner.

The applicant, Ms Yolanda Daniels, resided as an ESTA occupier in a dwelling on the farm Chardonne, which is owned by Chardonne Properties CC (the second respondent). The dwelling required improvements that were no more than basic human amenities. These included levelling the floors, paving part of the outside area and the installation of an indoor water supply, a wash basin, a second window and a ceiling. Crucially, the applicant was to carry the costs of making the improvements. Her attorney addressed a letter to the first respondent indicating her intention. Receiving no response, she enlisted a builder to make the improvements. When the builder arrived, the first respondent's attorney sent a letter which advised that permission to effect improvements was refused and demanded the builder to stop. Thereafter Ms Daniels sought a declarator that she was entitled to make improvements to the dwelling without the owner's consent.

Both the Stellenbosch Magistrates' Court and the Land Claims Court reasoned that ESTA sets out the rights of occupiers and that the right asserted by Ms Daniels was not one of those rights. Aggrieved, the applicant unsuccessfully sought leave to appeal from the Supreme Court of Appeal.

In this Court, Ms Daniels argued that the improvements were meant to bring the dwelling to a level consonant with human dignity. She contended that, based on the right to

human dignity which ESTA occupiers enjoy in terms of section 5 of ESTA, she was entitled to make the improvements. She also argued that this right is not a drastic intrusion into the common law rights of property owners.

The respondents contended that, in terms of section 25(6) of the Constitution, ESTA occupiers enjoy rights specified in an Act of Parliament. That Act of Parliament was ESTA and nowhere does ESTA provide for the right asserted by the applicant. Therefore, the right does not exist.

The respondents' other argument was that, because in terms of section 13 of ESTA an owner or person in charge may be ordered to compensate an occupier for improvements that the occupier made, affording an occupier the asserted right would effectively mean a positive duty was being imposed on an owner or person in charge to finance the improvements. The respondents contended that in accordance with our constitutional jurisprudence a positive duty could not be imposed on a private individual.

The Trust for Community Outreach and Education was admitted as a friend of the Court. It submitted that ESTA should be interpreted from the perspective of section 26 of the Constitution, which provides for the right to adequate housing, and the horizontal application of that right between private individuals.

The first judgment written by Madlanga J (Cameron J, Froneman J, Khampepe J, Mbha AJ and Musi J) (majority judgment) held that ESTA affords an occupier the right to make improvements to her or his dwelling without the consent of the property owner. However, meaningful engagement of an owner or person in charge by an occupier is required. This is necessary because the exercise of the occupier's right has the potential of intruding on an owner's property right under section 25 of the Constitution and the right to human dignity contained in section 5 of ESTA.

The majority judgment held that there was no constitutional bar to the imposition of a positive duty on a private individual. Whether or not such a duty may be imposed depends on a variety of factors. In the circumstances of this matter it was ordered to impose the duty. In particular, this was so because of the importance of the asserted right and the tenuous nature of the duty. The duty was tenuous because an owner or person in charge might or might not be ordered to compensate an occupier, depending on the court's exercise of a discretion.

Because no engagement had taken place between the applicant and the respondents, the first judgment ordered the parties to engage meaningfully regarding the implementation of the alterations. No order was made as to costs.

In a concurring judgment (the second judgment), Froneman J writes that before we can make substantial and lasting progress in making the ideals of the Constitution a reality at least three things must happen: (a) an honest and deep recognition of past injustice; (b) a re-appraisal of our conception of the nature of ownership and property; and (c) an acceptance, rather than avoidance or obfuscation, of the consequences of constitutional

change. In its exposition of certain relevant parts of South African history, the judgment shows that poor white people in the rural context benefited tremendously from concentrated social and political effort. The burning injustice, namely that this corrective action was not extended to black and “coloured” people, must and can be rectified. There is no reason to continue countenancing the continuation of inhuman and undignified living on farms any more. It cannot be tolerated in light of the constitutional mandate to heal the divisions of the past. In contemporary terms, where the privileged among us are used to reasonable housing, access to water, and electricity, there is no justification for denying it to others who do not yet have it, especially to those, like the applicant, who want to create those conditions for themselves. Moreover, status quo defences of existing property rights in law and economics discourse need to be reconsidered. Given this context, Froneman J thus agrees with the interpretation of ESTA and the conclusions drawn by Madlanga J.

In a judgment that concurs with Madlanga J and Froneman J (the third judgment), Cameron J wrote separately to underscore the importance of impartiality in one’s account of historical, interpretative background. Cameron J cautioned that courts should tread carefully in expressing their views of history. This is especially so where accounts are incomplete and where they are not directly functional to the determination of the dispute. Despite acknowledging that neither judgment’s historical account may be taken – could expect to be taken – as other than partial and incomplete reflections of our country’s fractured past, Cameron J noted the dire and pressing need to give that historical account voice. Despite the caution, perils, partiality and incompleteness of the historical accounts – Cameron J concurred in both judgments on the basis that when important things are being said, when insufficiently heard truths are being spoken, it is bad to hide behind the indeterminacies of history and the inevitable incompleteness and partiality of its telling.

In a separate concurring judgment (the fourth judgment), Jafta J (Nkabinde ACJ concurring) agrees with the first judgment and the order proposed, but disagrees with the first judgment on one issue. This is whether the Constitution imposes a positive obligation on a private person to enable bearers of rights guaranteed by the Bill of Rights to enjoy those rights. Jafta J holds that while section 8(2) of the Constitution illustrates that the rights in the Bill of Rights are not enforced only vertically but also horizontally, this provision cannot be read as being a source of any obligation, let alone a positive obligation borne by a private person. This matter concerns the interference of the enjoyment of Ms Daniels’ right of residence and this is the interference she seeks protection from, which is based on the negative content of the right of access to adequate housing. Therefore, it must be stressed that here we are not concerned with the right of access to land or restoration of a lost right in land.

In a separate judgment (the fifth judgment) Zondo J took the view that ESTA infuses justice and equity in the relationship between an occupier and a landowner and requires that a balance be struck between the rights of an occupier and those of a landowner. He also referred to the fact that in ESTA an occupier has a right to human dignity and in terms of section 6(2)(d) has a right to family life.

Zondo J pointed out that no prejudice would be suffered by the respondents if the applicant effected the improvements. The improvements, which would be basic, would enable the applicant and her children to live in the dwelling in conditions of human dignity. Zondo J held that whether or not the applicant was entitled to effect the improvements without the respondents' consent depended upon considerations of justice and equity when a balance is struck between the rights of the landowner and those of the occupier. He held that, in the circumstances of this case, when such a balance is struck, considerations of justice and equity dictated that the applicant is entitled to effect the improvements without the respondents' consent.

Finally, Zondo J held that, nevertheless, the parties should have a meaningful engagement on necessary logistical arrangements before improvements can be effected so as to ensure that minimum inconvenience was caused to all concerned. Zondo J agreed with the order proposed in the first judgment.