IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

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

14/12/22

CASE NO: LCC 257/2017

In the matter between:

GIDEON DU PLESSIS	First applicant / First respondent for leave to appeal
DAMETEX CC	Second applicant / Second respondent for leave to appeal
and	
MOSES HERMANUS ROSS	First respondent / First applicant for leave to appeal
MAUREEN ROSS	Second respondent / Second applicant for leave to appeal
ALL OTHER PERSONS OCCUPYING THE PROPERTY	Third respondent / Applicant for leave to appeal
THE CITY OF CAPE TOWN	Fourth respondent
HEAD: WESTERN CAPE PROVINCIAL DEPT OF RURAL DEVELOPMENT AND LAND REFORM	Fifth respondent

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JUDGMENT
APPLICATION FOR LEAVE TO APPEAL

COWEN AJ

1. On 26 May 2020, I delivered judgment in the application of Mr Du Plessis and Dametex CC for the eviction of Mr and Mrs Ross and their family from their home in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). Mr and Mrs Ross now apply for leave to appeal to the Supreme Court of Appeal against my orders 1, 2 and 3. I refer to the parties as in the main proceedings.

2. Section 17(1) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the judge is of the opinion that

> "*(a) the appeal would have a reasonable prospect of success; or*
>
> *(b) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.*

The SCA has held that

> "*[a]n applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal*".[1]

This Court has held that the use of the word 'would' in section 17(1)(a)

> '*indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against*'.[2]

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[1] *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016) at para 17.

[2] *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another* (75/2008) [2015] ZALCC 7 (28 July 2015) at paragraph [3] citing *The Mont Chevaux Trust (IT 2012/28) & Tina Goosen and 18 others* (LCC14R/2014) at para 6. The point made is that section 17 creates a higher bar for leave to appeal than was the case before the Superior Courts Act came into force.

3. On analysis, the application for leave to appeal is based on three core contentions, which, in turn, are based on a series of more detailed contentions. Some of the contentions overlap.

3.1. First, the court erred in concluding that the termination of Mrs Ross's rights as an ESTA occupier was lawful or just and equitable;

3.2. Second, the court erred in concluding that the termination of the ESTA rights of the Ross family was just and equitable; and

3.3. Third, the court erred in concluding that the requirements of section 10(3) of ESTA were met.

4. On 8 July 2020, the respondents applied to supplement their grounds for leave to appeal. The application is not opposed and is granted. The effect of the amendment is to supplement the third contention with a contention that the applicants did not plead compliance with section 10(3) of ESTA in their founding affidavits, upon which I relied to conclude that the eviction should be granted.

5. I have considered the grounds of appeal. I am not satisfied that the appeal pleaded would have a reasonable prospect of success or that there is another compelling reason why the appeal should be heard. It is of course true that the matter implicates important constitutional rights of Mr and Mrs Ross, as ESTA occupiers, and in Mrs Ross' case, as a rural woman. The respondents' difficulty is that the grounds of appeal, in various instances are not supported by the pleadings or evidence, misconstrue the applicants' case, misconstrue the judgment, do not correctly reflect the respondents' evidence or omit to reflect it fully, or were not raised in the answering affidavits when they should have

been. In some instances, the contentions restate submissions advanced during the hearing considered in the judgment without explanation of why the reasoning was incorrect. To the extent that the grounds of appeal are based on a correct analysis of the judgment, pleadings and the evidence, I am not satisfied that the appeal pleaded would have reasonable prospects of success. I am mindful that, in some measure, the appeal seeks a reconsideration of the discretions that resided with the court regarding the justice and equity of the termination of rights and the eviction itself. But once the above difficulties are factored in, it is difficult to see an adequate basis upon which an appeal would succeed. I do not detail my reasoning above with reference to each ground of appeal advanced or each contention made. But I consider it necessary to deal with three matters.

6. First, the application for leave to appeal places some reliance on the applicants' description of the rights in question as 'precarious', an issue raised during the hearing. In my view this is misplaced. While the applicants' use of the term was unfortunate, the founding affidavit explains this with reference to the fact that Mr Ross' rights were linked to his employment[3] and was not, as the respondents' representatives suggest, a contention that they were constitutionally or statutorily weak or merely terminable on notice.

7. Second, from the outset, the respondents have sought to defend the case in material measure on a contention that the application is fatally flawed due to the manner in which Mrs Ross's rights were sought to be terminated. In doing so, the respondents elected not to focus or argue other features of the applicants' case, even when pressed to do so. In this regard, it is correct that the applicants were of the view that Mrs Ross' rights were those of a family member of Mr Ross. But there can be no real debate that the applicants

[3] See para 8.7.

nevertheless approached the termination, and ultimately pleaded their case, on the basis that in light of *Klaase,* Mrs Ross may be regarded as having independent rights as an ESTA occupier. Indeed, the *Klaase* decision was the cause for the applicants withdrawing a prior eviction application and recommencing the termination process, with the effect that the applicants sought specifically to address the implications for the position of Mrs Ross.

8. It is also correct that the applicants nevertheless viewed any right to occupy and the basis of termination as interlinked with the rights of Mr Ross and their position as husband and wife. This was expressly pleaded with reference to paragraph 6.3 of the letter of 14 February 2020. But Mr Ross himself explained the circumstances in which Mrs Ross came to live on the property as his wife, and he expressly alleged in paragraph 22.4 of his answering affidavit that he and his wife would enjoy tenure subject to the agreement that was the subject of the first issue referred to oral evidence and dealt with in paragraphs 51 to 58 of the judgment. The conditions of Mrs Ross's right to occupy were thus, on Mr Ross' own version, interlinked with his employment. Mrs Ross filed a supporting affidavit in the application and confirmed what Mr Ross said. Furthermore, Mrs Ross was separately addressed in the October 2016 correspondence and her independent position acknowledged in the February 2017 correspondence. Like Mr Ross, she was afforded an opportunity to make representations and in doing so, as in the answering affidavits, made common cause on all material issues with her husband. She was represented by an experienced legal practitioner at the time. On the facts of this case the position of Mr and Mrs Ross are interlinked. And this is not a case where the conduct of a husband is being held against his wife, nor is it a case where there is any suggestion that the marriage is under threat or that the parties do not wish to continue to support each other or wish to part or reside separately. This is a case where on the information before

me, a husband and wife have, with integrity, approached their lives in a mutually supportive way and it does not undermine their dignity to acknowledge their position as husband and wife.

9. I am mindful now, as I was both during the hearing of the matter and when writing my judgment, that the position of Mrs Ross brings to the fore the position of often vulnerable rural women who are both ESTA occupiers in their own right and spouses of ESTA occupiers and that the case required the court to give effect to the principles the Constitutional Court articulated in *Klaase.*[4] I concluded that Mrs Ross is an occupier and entitled to ESTA's protections in her own right. No sight was lost of this finding when considering the justice and equity of the termination of their rights or her eviction. With the benefit of hindsight, it may have been sensible to explain my reasoning regarding Mr and Mrs Ross in separate sections, but the decision to do so together was deliberate and I elected rather to refer specifically to their independent position in that section where warranted. This is because a number of the issues on the pleadings are in important measures intertwined and affected both parties in similar ways.

10. Thirdly, the respondents' representatives elected not to focus argument on section 10 generally or section 10(3) specifically despite the applicants' representative doing so. Certain new contentions are now advanced which concern the proper interpretation of section 10(3)(b) and (c). I have not had the benefit of full argument on these issues. However, I have considered the submissions now advanced and the import of the case law now referred to and I am not persuaded that leave to appeal should be granted on the submissions advanced. On the face of it, the interpretation of section 10(3) that I

[4] *Klaase v van der Merwe* 2016(6) SA 131 (CC). The issue is articulated in 12.1 of the judgment and the findings in para 72 to 74.

endorsed accords with the language and purpose of the section, is not inconsistent with prior case law[5] and avoids an interpretation that can yield arbitrary deprivations of property rights in circumstances where occupiers' rights are protected *inter alia* by the test of 'serious prejudice'. Moreover, the case law cited confirms my conclusions that the applicants supplied the necessary evidence to meet the evidential standard and bring them into the narrow remit of section 10(3).[6] I do not agree that the applicants' case concerned some 'speculative, future activities which might very well never materialize'. Moreover, there is no dispute in this regard on the papers.

11. I make the following order:

11.1. The application for leave to appeal is dismissed.

11.2. Each party is to pay its own costs.

S J COWEN

Acting Judge, Land Claims Court

DATE OF JUDGMENT: 31 AUGUST 2020

[5] I do not agree with Mr Hathorn's submissions as regards the import of the findings of Gildenhuys J in *Theewaterskloof Holdings (Pty) Edms v Jacobs en andere* [2001] JOL 9039 (LCC). I have also considered the findings of Gildenhuys J in *Zorgvliet Farm en Estate (Edms) Bpk v Alberts en 'n ander* [2001] 1 All SA 62 (LCC) at paragraph 24 and *Kanlyn (Pty) Ltd v Mashiloane*1999(2) SA 55 (LCC). The issue was not decided in *Terblanche NO v Flippies and others* [2001] ZALCC 44 (2 November 2001) or *Rashavha v Van Rensburg* [2004] 1 All SA 168 (SCA) to which Mr Hathord also refers.

[6] *Cf Kanlyn (Pty) Ltd v Mashiloane*1999(2) SA 55 (LCC) at para 12. In that case the only 'facts' alleged by the applicant to show compliance with section 10(3)(c) was that the house was needed to provide accommodation for another employee.

Representation:

By agreement, the application was decided on written submissions in circumstances of the COVID-19 pandemic

For the Applicants

Adv L. Wilkin *instructed by* Marais Muller Hendricks

For the first to third respondents

Adv P Hathorn SC *instructed by* J D van der Merwe Attorneys

Fourth and fifth respondents

No appearance