IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC 27R/2019

MAGISTRATES COURT CASE NUMBER: 113/2018

In Chambers: Acting Judge President Meer

Delivered on: 16 October 2019

In the review proceedings in the case between:

IZAK WILHELMUS VAN DER MERWE N.O In his capacity as trustee of the PRC Trust	First Applicant
OHNA RENETTE VAN DER MERWE N.O In her capacity as trustee of the PRC Trust	Second Applicant
JESSE IRINE VAN DER MERWE N.O In her capacity as trustee of the PRC Trust	Third Applicant

and

ALIDA DIRKS	First Respondent
CEDERBERG MUNICIPALITY	Second Respondent

DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM Third Respondent

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JUDGMENT

MEER AJP

Introduction

[1] This matter comes before me on automatic review together with four others[1] in terms of section 19(3) of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"). On 26 August 2019 an order was granted in the Clanwilliam Magistrates Court sitting at Citrusdal evicting the First Respondent and those occupying under her from Montana Farm, being Portion 5 of farm 614, Cedarberg Municipality, owned by the PRC Trust of which the Applicants are trustees.

[2] The First Respondent has been residing on the farm for a period of thirty three years, permission to do so having been granted to her by previous owners. Her late husband was born on the farm. She resides on the farm with her children who are aged 25, 19 and 12. The First Respondent's children have been living with her on the farm by consent, according to the Applicants since 2009. The First Respondent works on a neighbouring farm for four half days a week.

[3] As in LCC24/R2019 to LCC28R/2019, the Applicants sought and obtained the eviction of the First Respondent and her family on the grounds that the she had committed a material breach contemplated in term of section 10(1)(c) of ESTA

[1] The matter was referred in a batch as Case Nos 110 - 114/2008, by the Clanwilliam Magistrates Court on review to this Court. See Judgment in LCC 24R/2019 at paragraphs 1 and 2. The latter judgment was handed down simultaneously with this judgment.

and that the relationship between the Applicants and her had broken down to such an extent that it could not be remedied or the relationship could not reasonably be restored. As in the other cases referred to above, the court *a quo* did not give reasons for its order. This is disquieting. Occupiers who have resided on farms for lengthy periods of time, if not their whole lives, ought to be given the courtesy of considered reasons for the termination of their right of residence.

[4] The allegations against the First Respondent in this matter are precisely the same as those against the other Respondents in the aforementioned cases, namely that she failed to pay rental in terms of a lease agreement, she laid unfounded criminal charges against the First Applicant and she failed to restrain her dogs. These are allegations repeated verbatim in the founding affidavit against each of the Respondents in the five eviction cases the Applicants brought in the court *a quo*. There is however no evidence on the papers to suggest that these general complaints against all the Respondents were in relation to the first Respondent in this matter specifically, of such a serious nature as to have resulted in a material breach or in the breakdown of the relationship as suggested by the Applicants. I am therefore unable to find that there was compliance with section 10(1) of ESTA.

[5] I am in addition unable to find that the termination of the Frist Respondent's rights of residence was just and equitable in terms of section 8(1) of ESTA. This is so because, as in the other aforementioned cases, there is no evidence on the papers that section 8(1)(e) of ESTA was complied with in that in that a fair procedure was followed when terminating her right of residence, including that the First Respondent was not given an effective opportunity to make representations before the decision was made to terminate her right of residence. The submissions in the founding affidavit concerning compliance with the subsection do not detract from my view.

[6] Commenting on section 8(1)(e), the Constitutional Court in *Snyders and Others v De Jager and Others* [2016] ZACC 55 at paragraph 75 held as follows: "*ESTA requires the termination of the right of residence to also comply with the requirement of procedural fairness to enable this person to make representations why his or her right of residence should not be terminated. This is reflected in section 8(1)(e) of ESTA. A failure to afford a person that right will mean that there was no compliance with this requirement of ESTA. This would render the purported termination of the right of residence unlawful and invalid. It would also mean that there is no compliance with the requirement of ESTA that the eviction must be just and equitable.*"

See also *South African National Roads Agency v Jubber and Others*, LCC56/2019, (unreported, delivered 2 October 2019).

[7] Given the long period that the First Respondent had resided on the property and the fact that an eviction order would render her homeless and remove her from the farm she had lived on for most of her life, this was clearly a case where there ought to have been an effective opportunity to make representations before the decision was made to terminate the right of residence as envisaged in section 8(1)(e). The allegations of material breaches do not detract from this.

[8] In view of the above, the failure to comply with section 8(1)(e) does not render the termination of the right of residence just and equitable as required by section 8. On this basis alone the Applicants failed to make out a case for eviction. The eviction order against the First Respondent cannot be confirmed on review.

[9] In respect of the eviction order against those residing through her, namely her children, the Applicants' stance that they did not have any independent right of residence simply cannot be sustained in the light of the Constitutional Court judgment of *Klaase and Another v Van de Merwe N.O and Others* 2016 (6) SA 131 CC. *Klaase* recognised that the rights of residence of persons like the Respondent's children derive from consent flowing from the combined operation of section 3(4) and 3(5) of ESTA. Discussing these subsections at paragraph 59,

the Court acknowledged *"ESTA provides that for the purpose of civil proceedings in terms of ESTA, a person who has continuously and openly resided on land for a period of (a) one year shall be presumed to have consent to do so unless the contrary is proved and (b) three years shall be deemed to have done so with the knowledge of the owner or the person in charge".*

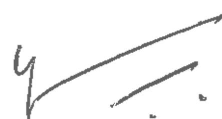
[10] The Court went on to state that it was demeaning to subordinate the rights of Mrs Klaase, the person who had openly and continuously resided on the farm in that case, to those of her husband. The Court found that she was an occupier in her own right entitled to the protection of ESTA.

[11] The principle established in *Klaase* applies equally in respect of the First Respondent's children. Post-*Klaase* they can no longer be regarded as mere residents who occupy under the household head. They are occupiers in terms of section 3(4) and 3(5) of ESTA whose right of residence stemmed from consent. See also the unreported judgements of *D J Wium and Others* LCC218/2016 delivered on 27 November 2017 and *Goedverdiend Plase (Pty) Ltd and Others v Andrews and Another* [2018] ZALCC 24.

[12] As their right of residence flowed from consent, the termination thereof had to occur in terms of section 8(1) of ESTA. The Court *a quo* failed to consider any of these factors in relation to them independently of the First Respondent. The order for their eviction accordingly cannot be confirmed.

I order as follows:

1. The order for the eviction of the First Respondent and those residing through her in case number 113/18 by the Clanwilliam Magistrates' Court is set aside.



Y S MEER

Acting Judge President

Land Claims Court