



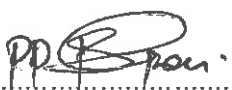
**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NO: LCC 56/2019

Before: The Honourable Acting Judge President Meer and Judge Carelse

Heard on: 19/09/2019.....

Delivered on: 02/10/2019.....

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
02/10/2019 DATE	 SIGNATURE

In the matter between:

SOUTH AFRICAN NATIONAL ROADS AGENCY

Appellant

and

ALLAN LESLIE JUBBER

First Respondent

SELEENA LUDAVICA

Second Respondent

THE BITOU MUNICIPALITY

Third Respondent

JUDGMENT

MEER AJP

Introduction

- [1] The Appellant appeals against an order of the Magistrate's Court, Knysna which dismissed an application in terms of the Extension of Security of Tenure Act, No. 62 of 1997 ("ESTA") for the eviction of the First and Second Respondents from the Appellant's property, described as the remainder of portion 9, Buffels Rivier number 288, the Craggs, Knysna Western Cape ("the property").
- [2] In so doing the Appellant applies for condonation for the late filing of the appeal. The Appellant explains that the delay in prosecuting the appeal was due to the Magistrate's Court record being unavailable. The Appellant contends that the parties have not been prejudiced by the delay as it was of short duration and not occasioned by malice or negligence. The Respondents do not oppose the condonation application. I am satisfied that good cause for the granting of the application has been showed. Condonation is accordingly granted.
- [3] The grounds of appeal are that the Magistrate erred in finding that the First Respondent was a long term occupier as defined in section 8(4) of ESTA and

that his right of residence may not be terminated unless he had committed a breach as contemplated in section 10(1)(a), (b) or (c) of ESTA.

Background Facts

- [4] The First and Second Respondents (“the Occupier Respondents”) are spouses who contend they have been living on the property since 2000, a contention the Appellant has no knowledge of. However, a written lease agreement was entered into on 22 June 2012 between the parties in terms whereof the Occupier Respondents leased a dwelling on the property for a monthly rental of R2928.00 until 31 May 2015, being the recorded termination date of the lease agreement. The dwelling as described in the lease agreement comprised three bedrooms, a separate lounge/dining room, a kitchen, two bathrooms and a garage.
- [5] In breach of the lease agreement, the Occupier Respondents failed to pay the rental and as of 31 March 2016, according to a schedule annexed to the founding affidavit, their rental arrears were R66 680.10 (sixty six thousand six hundred and eighty Rand and ten cents). Issue is not taken with the statement of arrears in the answering affidavit of the Occupier Respondents.
- [6] On 20 May 2015 the Appellant by written notice informed the Occupier Respondents that the lease was terminated and that they would be expected to vacate the premises by 30 June 2015.
- [7] When the Occupier Respondents failed to vacate the premises the Appellants gave further notices in late 2015 and gave final notice on 20 October 2015. Thereafter a notice in terms of section 9(2)(d) of ESTA, after the termination of their right to residence, was given to the Occupier Respondents, the Municipality (the Third Respondent) and the Department of Rural Development and Land Reform of the Appellant’s intention to obtain an order for eviction.

- [8] The Second Respondent is sickly and the Occupier Respondents have adopted a minor child who has special needs. The Second Respondent receives a government disability grant for chronic depression and anxiety. She has a degenerative spinal disease and severe arthritis. Both Occupier Respondents are unemployed. In the answering affidavit, the First Respondent states that the reason they have not vacated the property is because they do not have anywhere to move to and no money to do so. Their son who assisted them in the past with paying the rent is no longer in a position to assist. He states that they have paid a rental of R150 per month since 2005 and that they continue to do so every month. They cannot find alternative accommodation and they do not have the finances to rent another property.
- [9] A report filed by the Municipality records that the Occupier Respondents are not on the Municipality's formal housing list which numbers some seven hundred and fifty people. The report states that it would be manifestly unfair if the Occupier Respondents were placed on the formal housing waiting list ahead of those persons who are already on the list. The Municipality is prepared to provide the Occupier Respondents with an emergency housing kit. This comprises six poles, two vehicle loads of wooden planks, gumplast and roofing sheets for a roof, and gumplast for interior insulation with which to build an informal temporary structure. The report states that the "Department" will identify a small space of land where basic services are provided in terms of government policy, namely a water standpipe within 100 metres of the dwelling and a toilet shared with up to four other families on which the Occupier Respondents may erect their structure.
- [10] A probation officer's report in terms of section 9(3) of ESTA records that the Occupier Respondents each receive a monthly grant of R1600 and a child support grant of R360 making their total monthly income the sum of R3260. Their total monthly expenses are recorded as R3150. The probation officer interviewed the Occupier Respondents only. The report recommends that the

Occupier Respondents should not be evicted and records the hardship they would suffer, *inter alia* that they would be left destitute, they have no means to procure housing and their child's schooling will be interrupted.

Discussion

Did the Magistrate err in finding section 8 (4) applied to the First Respondent?

[11] Section 8(4) of ESTA provides that the right of residence of an occupier who has resided on land for 10 years and who has reached the age of 60 years may not be terminated unless that occupier has committed a breach contemplated in section 10(1) (a), (b) or (c). Section 9(2)(d) contemplates that after the termination of the right of residence, the occupier receives notice of intention to obtain an order for eviction. These two sections read together make clear, in my view, that in order to enjoy the protection of section 8(4) of ESTA, the occupier must have reached the age of 60 years at the time of the termination of the right of residence. The First Respondent was born in October 1956. As aforementioned the first notice terminating the right of residence was received on 20 May 2015 and the second notice on 20 October 2015. The First Respondent was aged 59 and the Second Respondent was aged 56 when the termination notices were given. Accordingly, the First Respondent was not 60 years of age as required in terms of section 8(4) for him to enjoy the status of a long-term occupier.

[12] In *Rashavha v Van Rensburg*¹ Lewis JA stated as follows:

“[12] As indicated earlier, it is section 8(4) on which the appellant has based her appeal. Ms Cassim argued that the section should be interpreted in line with the spirit and purpose of the Act, which is to protect farm dwellers from eviction and to change patterns of land tenure in South Africa. The Act, which forms part of the land tenure reform programme of the State, is itself founded on s 25(6) of the Constitution (Act 108 of 1996). The subsection provides that ‘A person or community

¹ [2003] ZASCA 132.

whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparative redress’.

[13] On that basis, Ms Cassim submitted that one should not give too narrow a construction to the words in s 8(4)(a). Although the appellant was not yet 60 when her right to reside on the farm terminated, one should take into account the length of her service and residence on the farm (some 20 years), and that, on the assumption that the appellant was 58 (or even possibly 59) when her services were terminated, the requirements of s 8(4)(a) were met, such that she could not be evicted. Sixty, it was argued, on a generous and purposive construction of the Act, included 58 and 59. Counsel was unable to suggest where the cut-off point should be.

[14] The argument is absurd, and was rejected in clear terms by the court of first instance and by the Land Claims Court. The words of s 8(4)(b) are clear. There is no need to resort to an interpretation of a section, generous, purposive or otherwise, where there is no uncertainty as to its meaning. The appellant, in order to rely upon the section, would have had to show that at the time when the eviction was sought, she had resided on the farm for 10 years and was at least 60 years old. That she could not do.”

[13] In the present matter given that neither of the Occupier Respondents had reached the age of 60 at the time of the termination of their right of residence, they did not fall within the ambit and protection of section 8(4) of ESTA. The court *a quo* accordingly erred in finding that section 8(4) was applicable.

Were sections 8(1) and 11 of ESTA complied with?

[14] The Occupier Respondents' right of residence flowed from consent acquired initially in 2000 and thereafter as formalised in the written lease agreement aforementioned. Their right of residence accordingly had to be terminated in terms of section 8(1). As they became occupiers after 4 February 1997, the conditions for an order for eviction in terms of section 11 had to be complied with.

[15] Section 8 (1) states:

"Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to—

(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;

(b) the conduct of the parties giving rise to the termination;

(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;

(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and

(e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence."

Section 11 provides as follows:

"11. Order for eviction of person who becomes occupier after 4 February 1997.-

(1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.

(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.

(3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to—

(a) the period that the occupier has resided on the land in question;

(b) the fairness of the terms of any agreement between the parties;

(c) whether suitable alternative accommodation is available to the occupier;

(d) the reason for the proposed eviction; and

(e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.”

[16] The question that now arises is whether the termination of the Occupier Respondents' residences was just and equitable as required by section 8(1) and 11.

Section 8 (1)

[17] Section 8(1) requires me to consider “all relevant factors” and, in particular, the specific criteria in subparagraphs (a) to (e), in determining whether the termination of the right of residence was just and equitable.

The nature of the enquiry was described by the Constitutional Court in *Snyders*² as follows:

“Section 8(1) makes it clear that the termination of a right of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirement for the substantive fairness of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable. The requirement for procedural fairness is captured in section 8(1)(e).”

- [18] As regards subparagraph (a) of section 8(1), the owner relies on the provisions of the lease agreement the terms of which have not been attacked for being unfair. The agreement did not in my view constitute a waiver of the rights of the Occupier Respondents as contended by them, given that their rights of residence in fact flowed from consent which predated the agreement. It is so that the agreement terminated with the effluxion of time but this did not affect their consent which predated the agreement.
- [19] As regards subparagraph (b), it was the failure of the Occupier Respondents to pay the rental in terms of the agreement which precipitated the termination. There is no evidence that the Appellant afforded them an opportunity to make representations before the termination as is dealt with more fully below.
- [20] As regards subparagraph (c) on the other hand, terminating the Occupier Respondents' rights of residence would mean hardship to them on a significant scale. They would be deprived of their home of almost twenty years. The offer of emergency housing as described by the Municipality to the elderly Occupier Respondents given their profile does little to

² *Snyders and Others v de Jager and Others* [2016] ZACC 55 at para 56.

alleviate their hardship. The hardship to the Appellant would not be on par with that of the Occupier Respondents notwithstanding the arrear rentals.

- [21] Comparing the potential hardships, those of the Occupier Respondents far outweigh those of the Appellant, notwithstanding the arrear rental. There is no evidence of a pressing need by the Appellant for the premises occupied by the Respondents. Albeit that they were made in the context of a different statute, the following remarks of Wallis JA in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others*³ apply to the circumstances of this matter:

“If the landowner had no immediate or even medium term need to use the property and it would simply be sterilised by an eviction order, the court could legitimately hold the view that it was not just and equitable at that time to grant an eviction order. That would be reinforced by a lack of availability of alternative land.”

- [22] As regards subparagraph (d) there is no evidence of a reasonable expectation of the renewal of the lease agreement.

- [23] As regards subparagraph (e), the Constitutional Court in *Snyders* 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

³ [2012] ZASCA 116 at fn 23.

*there is no compliance with the requirement of ESTA that the eviction must be just and equitable.*⁴

[24] There is no evidence on the papers that the Occupier Respondents were given an opportunity to make representations before the decision was made to terminate their right of residence. Advocate Randles for the Appellant applied for a postponement of the appeal to permit such evidence to be adduced. He however was unable to provide a reasonable explanation as to why that evidence was not initially adduced. In opposing the application, Ms Mugunyani for the Occupier Respondents correctly in my view submitted that the Appellant was seeking to “fix” their papers by introducing evidence. The application was refused.

[25] Given the particular hardships for the Occupier Respondents that would flow from an eviction, to which I have referred earlier, 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 failure to do so rendered the termination unfair. I am accordingly not satisfied that the Appellant has shown that a fair procedure was followed in terminating the right of residence. The appellant has consequently failed to show that the termination of the respondents’ right of residence was just and equitable as required by section 8. On this basis alone the appellant failed to make out a case for eviction.

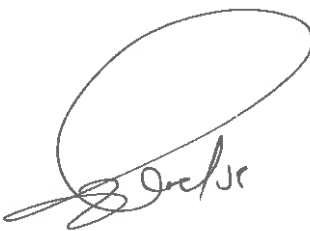
[26] However for the sake of completeness I note that the application for eviction did not pass muster as against the requirements of section 11 of ESTA. The conditions for an order of eviction under section 11 too are grounded in the concept of just and equitable, and in no small measure

⁴ *Snyders and Others v de Jager and Others* [2016] ZACC 55 at para 75.

mirror section 8(1). On an application of the factors at section 11 the Appellant also failed to make out a case for eviction.

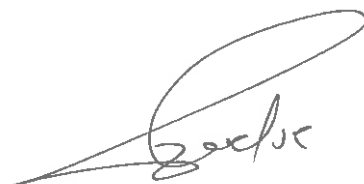
I accordingly order as follows:

1. The appeal is dismissed.
2. There is no order as to costs.

pp 

Y S MEER
Acting Judge President
Land Claims Court

I agree



Judge Z Carelse

APPEARANCES**For the Appellant:****Adv. G. Randles****Instructed by:****Mosdell Pama & Cox Attorneys****For the First and Second Respondents:****Ms. T. Mugunyani****Instructed by:****Lawyers for Human Rights**