
SOUTH AFRICA / JUDGMENT

Barnard v September and Others (LCC71R/2016) [2017] ZALCC 16 (7 March 2017)

[2017] ZALCC 16

COURT

Land Claims Court

BEFORE

Y S Meer, Poswa-Lerotholi

CASE / FILE NUMBER

LCC71R/2016

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

Case No.: LCC 71R/2016

In the matter between:

CHARLES BARNARD

Appellant

and

NORA SEPTEMBER

First Respondent

NORMAN SEPTEMBER

Second Respondent

WILLIAM SEPTEMBER

Third Respondent

JUDGMENT:

7 March 2017

MEER AJP.

Introduction

[1] The Appellant appeals against a judgment and order of the Robertson Magistrate's Court, dated 7 July 2016. The judgment refused an application for the eviction of the Respondents under the Extension of Security of Tenure Act No 62 of 1997 ("ESTA"),

from the Farm 251, Klaasvoogds East, Robertson, Western Cape, ("the farm"), which is owned by the Appellant. The application was refused primarily because the Court a quo held that ESTA was not the applicable legislation to the matter, as there was a commercial lease agreement between the parties. The court found instead that it was the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("PIE"), that was applicable.

Background

Facts

[2] The Appellant bought the farm during June 2009. The First Respondent lives in a labourer's cottage on the farm together

with her son Norman, the Second Respondent and her minor daughter. The Third Respondent, the eldest son of the first Respondent, no longer resides on the farm. The First Respondent currently works as a housekeeper and earns R1680.00 per month.

According to the First Respondent she and her ex-husband, Willem September, began residing on the farm during 1992 after being

employed by the previous owner of the farm, one Nacky Smit. During this time the First Respondent was employed as a general

worker by the previous owner.

[3] The Appellant denies that the First Respondent and her husband have been living on the farm since 1992. According to the Appellant prior to 2000, they were residing on Klippiessdal, a neighbouring farm, and they only moved to the Applicants farm during 2000. In 2009 when the Appellant purchased the farm, he was aware that the First Respondent and her family were residing there and he agreed to allow them to continue to occupy the cottage. The First Respondent and her husband Willem September divorced in September 2014 and the latter vacated the farm thereafter.

[4] In July 2013 four years after the Appellant purchased the farm, he concluded a lease agreement with the First Respondent in terms of which the Respondents would rent the labourer's cottage for a twelve month period at a rental of R200.00 per month. Clauses 3 and 4 of the lease agreement provided that the First Respondent would have an option to renew the lease for a further period of twelve months after its expiry on 30 June 2014, such option to be exercised by written notice to the Appellant one calendar month before the expiry of the lease agreement. According to the First Respondent the lease agreement given to her

was illegible, its terms were not explained to her by the Appellant, and she was not familiar with complex legal transactions and contracts, due to her low level of education.

- [5] On 25 June 2013 the Appellant concluded an employment agreement with the Third Respondent in terms of which the Third Respondent was employed as a gardener. The employment of the Third Respondent was subsequently terminated and as aforementioned he has left the farm. The First Respondent alleges that shortly thereafter she received a text message from the Appellant informing her that her employment was terminated, that she was required to hand over the keys to the guest house and not set foot there ever again. The replying affidavit denies that the First Respondent was ever employed by the Appellant and avers that the First Respondent was employed by Ms Wijngaarden who managed the guest cottages on the farm.
- [6] On 9 August 2014 the Appellant handed the First and Third Respondents a letter informing them that the lease agreement had expired and that they were required to vacate the farm by 1 December 2014. The letter recorded that the lease agreement had expired in consequence of the First Respondent's failure to give one calendar month's notice before 30 June 2014, thereby exercising the option to renew the lease. Thereafter on 26 August 2014 the Respondents were given written notice to vacate the farm by 11 December 2014, failing which an application for eviction would be brought. On 22 January 2015 the Appellant instituted eviction proceedings in the Robertson Magistrate's Court, and on 7 July 2016 the application was dismissed for the reasons stated above.

Discussion

The finding of the court a quo that ESTA did not apply to the application

- [7] The question whether PIE or ESTA applied had not been ventilated in the Court a quo, nor did the Magistrate request submissions on the point. It is therefore disquieting that the Magistrate made a finding on a legal point not emerging from the papers, not raised by the parties and without requesting submissions on the issue. The Magistrate was however clearly in error in finding that ESTA did not apply in circumstances where the parties had entered into a lease agreement. There is no provision in ESTA which excludes from its protection people who are on land by virtue of a lease

agreement. The court a quo's reference to commercial agreements is misplaced. There is no evidence that the respondents were using the premises for commercial purposes and the so-called commercial nature of the lease agreement must, at best be ascribed to an error on the part of the magistrate. The magistrate moreover erred in finding that PIE was applicable. Although PIE does not explicitly exclude agricultural land from its ambit, it does exclude occupiers in terms of ESTA such as the Respondents. Section 1(xi) of PIE states:

“unlawful occupier” means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law or occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No.31 of 1996). (vii)”

I note moreover that PIE does not specifically mention agricultural land at all, contrary to the magistrate’s comments.

[8] In the circumstances the magistrate’s decision for refusing the application was based on errors both of law and of fact. The Respondents were clearly occupiers under ESTA and the Court a quo ought to have considered whether the application for their eviction should be granted in terms of Section 9(2) of ESTA which sets out the mandatory requirements for the evictions of occupiers. This is an exercise which now falls to be undertaken on appeal.

Compliance with Section 9 (2) of ESTA

Section 9 (2) of ESTA provides as follows:

“(2) A court may make an order for the eviction of an occupier if—

- (a) the occupier’s right of residence has been terminated in terms of section 8;
- (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
- (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
- (d) the owner or person in charge has, after the termination of the right of residence, given—
 - (i) the occupier;
 - (ii) the municipality in whose area of jurisdiction the land in question is situated; and
 - (iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes, not less than two calendar months’ written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.”

I now turn to consider whether the Appellant has complied with each of the requirements of Section 9 (2) (a) to (d), of ESTA, entitling him to an order for the eviction of the Respondents

Compliance with Section 9(2)(a)

[9] Section 9(2) (a) permits an order for the eviction of an occupier if the occupier's right of residence has been terminated in terms of Section 8. Section 8, in relevant part reads as follows:

"8.(1) 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 25 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 30 effective opportunity to make representations before the decision was made to terminate the right of residence.
- (2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of 35 the Labour Relations Act.
- (3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act."

[10] A preliminary question in relation to section 8 is whether sections 8(2) and 8(3) apply to the Respondents. These sections

would apply if they were employees and their rights of residence arose solely from their employment relationship. This is not the

situation. When the Appellant purchased the farm in June 2009, the first Respondent and her family were occupying the labourer's

cottage, and he agreed to allow them to continue to do so. Their right to reside was thus based on consent and continued as such until 2013 when the lease came into being. In this regard Section 3 of ESTA includes the following relevant subsections:

“(4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.

- (5) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge.”

- [11] The Respondents’ rights of residence thus derived from consent that must be presumed from the combined operation of subsections (4) and (5) of section 3 of ESTA in respect of the period 2009 to 2013. It is therefore Section 8 (1) that has application to the termination of their right of residence and the question arises whether the termination was just and equitable as required by section 8(1). This requires me to consider all relevant factors, and in particular the specific criteria in subparagraphs (a) to (e) of the subsection. In *Snyders and Others v De Jager and Others* (CCT 186/15) 2016 ZACC 55 (21 December 2016), the Constitutional Court stated as follows at paragraph 56:

“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).”

Section 8(1) (a) The Fairness of the Agreement

- [12] The Appellant relies on the lease agreement concluded between him and the First Respondent on 25 June 2013 as the basis for the termination of the Respondents’ right of residence. The expiry of the lease and the failure of the First Respondent to exercise the option to extend the lease was the only reason relied upon in the letter dated 9 August 2014 to the Respondents requiring them to vacate the farm, and in the subsequent notice in terms of section 9 of ESTA delivered to the Respondents on 26 August 2014.
- [13] Clauses 3 and 4 of the lease agreement provide for the termination of the First Respondent’s right of residence on the farm by effluxion of time, and upon her failure to exercise the option to renew the lease by providing one calendar month’s notice prior to the expiry of the lease agreement. The lease agreement and especially these clauses, in effect provided for the First Respondent’s pre-existing right of residence flowing from consent in terms of section 3 of ESTA to be terminated automatically. It also provided for the right of residence in terms of the lease agreement to be terminated on expiry of the lease. In both instances, the terminations were otherwise than in accordance with Section 8 (1)
- (a) to (e) of ESTA. As such the lease agreement amounted in my view to a waiver of the First Respondent’s rights to a just and equitable termination of her right of residence in terms of Section 8, contrary to the provisions of Section 25(1) of ESTA. That section states:

“25.

- (1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of a court.”
- [14] Not only did the lease agreement constitute a waiver and limitation of the first respondent’s rights by bypassing the requirements of Section 8(1) of ESTA, but it unilaterally, without the appellant affording the First Respondent the opportunity to make representations under Section 8(1)(e), substituted her right of residence flowing from consent with a right of residence flowing from a fixed time lease agreement. The lease agreement was, in the circumstances not fair, and therefore contrary to Section 8(1)(a) of ESTA.

Section 8(1)(b) The Conduct of the Parties

- [15] As is contended on behalf of the Respondents, allegations of misconduct on the part of the Respondents appear only in the replying

affidavit and no meaningful attempt is made to justify the termination of the right of residence for reasons other than the termination of the lease agreement through effluxion of time. It is of course not open to the Appellant to raise new allegations in reply, and accordingly no basis for the termination can be laid on the conduct of the Respondents.

Comparative Hardship (Section 8(1)(c))

- [16] An eviction will render the Respondents homeless as they have no access to alternative accommodation. The Appellant on the other hand owns another home in Pretoria and seeks to retire to the farm and occupy the cottages in which the Respondents reside and hire out the guest houses on the property. Given that the Appellant does not face the prospects of homelessness. The comparative hardship of the Respondents exceeds his by far.

Reasonable Expectation of the Renewal of the Agreement

- [17] According to the First Respondent, she was not aware that after more than 23 years of residence on the farm, she was suddenly required to give written notice if she wished to live on the farm for another 12 months. This being so, the probabilities are, that she had a reasonable expectation of renewal of the agreement. Had the situation been otherwise, the likelihood is that she would have given written notice.

Fairness of Procedure (Section 8(1)(e))

- [18] Given the particular hardships for the Respondents that would flow from an eviction, 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) of ESTA. This did not occur. The Respondents were not given an opportunity to make representations

when their right of residence flowing from consent was unilaterally terminated and replaced with a lease agreement. Nor were they given an opportunity to make representations before the letter dated 9 August 2014 was sent to them stating that the lease agreement had expired and they were required to vacate the property. Fair procedure was accordingly not followed in compliance with Section 8

(1) (e) by the Appellant.

Non-compliance with Section 9(2)(c)

[19] Section 9(2) (c) of ESTA requires the conditions for an order for eviction in terms of Section 10 or 11 to have been complied with. The former section applies in respect of persons who were occupiers on 4 February 1997, whilst the latter has application to those who became occupiers after that date. Whilst the Appellant disputes that the First Respondent had been residing on the farm since 1992 as averred by her in her answering affidavit, and asserts instead that she took up residence in 2000, he has not in my view in reply, seriously and unambiguously disputed the First Respondent's assertion.

Paragraph 5.2 of the replying affidavit states:

“Die Respondente het eers gedurende die jaar 2000 na die plaas verhuis. Hul was voorheen woonagtig op Klippiesdal, ‘n naburige plaas. Dit is dus onwaar dat hul alreeds gedurende 1992 woonagtig was op die plaas. Hul het vanaf 1992 tot 2000 op die plaas Klippiesdal gewoon en het in 2000 eers na die plaas verhuis en woon dus nou eers 15 jaar op die plaas.”

Paragraph 12.2 states:

“Ek bevestig dat Eerste Respondent se bewering “en het ons gedurende 2000 na die groter kothuis op die plaas verhuis” vals is. Daar is geen ander kothuis op die plaas wat nog ooit deur enige plaaswerkers bewoon is en vanwaar die Respondente kon getrek het nie. Eerste Respondent en haar gewese man het in der waarheid gedurende 2000 vanaf ‘n ander plaas, Klippiesdal,

verhuis na die plaas en is die twee heeltemal verskillende plase. Waar Eerste Respondent dus beweer dat hul gedurende 2000 verhuis het, was dit uiteraard vanaf ‘n heeltemal ander plaas.”

[20] Given that the Appellant only purchased the farm in 2009, and there is no evidence that he had personal knowledge of circumstances and events thereon in 2000, these allegations are in my view vague and hearsay and in the absence of counter-veiling evidence, constitute a bare denial. There is, as contended by Mr Magardie on behalf of the Respondents, neither an affidavit from the owner of Klippiesdal farm supporting the Appellants version, nor an explanation as to why such was unobtainable. I am inclined to agree in the circumstances that no genuine dispute of fact has been raised in relation to the First Respondent's assertion that she resided on the farm since 1992 and her version in this regard must be accepted. As was said in *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at paragraph 13:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity of accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.”

[21] I pause to mention that even had Section 11 of ESTA been applicable, as contended for on behalf of the Appellant, the application

for eviction would not have passed muster as being just and equitable under Section 11 (1) of ESTA, which applies to agreements for the termination of rights of residence on a particular date. This is so, given my finding that the termination was not just and equitable in terms of Section 8 (1).

[22] The requirements for an eviction order against an occupier like the First Respondent who resided on land as of 4 February 1997 are set out in Section 10 of ESTA which provides as follows:

“ 10. Order for eviction of person who was occupier on 4 February 1997.—

- (1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if—
 - (a) the occupier has breached section 6 (3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
 - (b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier’s right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar months’ notice in writing to do so;
 - (c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or
 - (d) the occupier—
 - (i) is or was an employee whose right of residence arises solely from that employment; and
 - (ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.

- (2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may

grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.

- (3) If—

- (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
- (b) the owner or person in charge provided the dwelling occupied by the occupier; and
- (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—

- (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative

accommodation for the occupier; and

- (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.”

[23] In this matter no reliance is placed on any breach as contemplated in section 10 (1) (a) to (c), or on any voluntary resignation as contemplated in section 10(1) (d). Nor does Section 10(2) have applications as the issue of suitable alternative accommodation has not been satisfied.

[24] It is section 10 (3) then, which has application to occupiers like the Respondents. The section in relevant part states:

“(3) If-

- (b) the owner or person in charge provided the dwelling...; and
- (c) if the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

a court may grant an order for eviction..... if it is just and equitable to do so having regard to-

- (i) the efforts to which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative

accommodation; and

(ii) the interests of the parties including comparative hardship.....”

There is no evidence that the conditions for an order of eviction at Section 10 (3) (b) and (c) have been complied with. Nor is their evidence in respect of (i) and (ii) above. No case has been made out that the efficient carrying on of any operation of the Appellant will be seriously prejudiced unless the dwelling occupied by the Respondents is available for occupation by any other person employed by the Appellant. There is also no evidence to suggest that the Appellant has taken any steps to assist the Respondents with suitable alternative accommodation. Accordingly, the requirements of section 10 (3) are also not satisfied.

[25] In those circumstances, the Appellant has failed also to show that he satisfied the requirements of section 9 (2) (c) of ESTA.

Compliance with Section 9 (2)(d)

[26] Mr Magardie submitted that the above section had not been complied with as notice of the eviction application was not served on the Department of Rural Development and Land Reform timeously. It is common cause that the Notice of Motion in the eviction application was served on the Department of Rural Development and Land Reform on 10 and 11 February 2015. Whilst the notice of motion indicates that the application would be heard on 5 March 2016, it became opposed and was ultimately only heard on 21 January 2016. Section 9 (2)(d) provides for service of such notice to occur two months before the commencement of the hearing. Such notice was complied with, notwithstanding notice having been given less than two months before the date that the application was initially set down.

[27] The Appellant accordingly did satisfy Section 9 (2) (d) and it was not in issue that section 9 (2) (b) was complied with. However this does not avail him as the requirements of section 9 (2) of ESTA are cumulative. Failure to comply with any one of subparagraphs

(a) (b)

(c) or (d) of section 9 (2) is fatal to an application for eviction. The Appellant has failed to demonstrate that he has made out a case for an eviction order in accordance with the requirements of sections 9(2)(a) and (c) of ESTA.

Costs

[28] The Respondents sought a cost order against the Appellant. In keeping with the practice of this Court not to award costs in applications such as these which are of the genre of social action litigation, I make no order as to costs.

[29] I grant the following order:

1. The Appeal is dismissed.
2. The order granted by the Court a quo is set aside and substituted with the following order:

“The application is dismissed.”

2. There is no order as to costs.

Y S MEER

Acting Judge President

Land Claims Court

I agree and it is so ordered.

POSWA-LEROTHOLI

Acting Judge

APPEARANCES:

For the Applicant:

Adv. Almero De Villiers

Instructed by:

Du Bois Attorneys

For the First and Second Defendant: Adv Sheldon MAgardie

Instructed by:

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