

SOUTH AFRICA / JUDGMENT

Boplaas Landgoed (PTY) Ltd and Another v Jonkies and Others (LCC 37/2022) [2022] ZALCC 38 (15 August 2022) [2022] ZALCC 38

COURT

Land Claims Court

BEFORE

Y S Meer, S J Cowen

CASE / FILE NUMBER

LCC 37/2022

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

AT RANDBURG

CASE

NO: LCC 37/2022

Reportable:

Yes

Of

Interest to other Judges: Yes

Revised

Before:

The Honourable Acting

Judge President Meer and Cowen J

Heard

on: 26 July 2022

Delivered

on: 15 August 2022

In

the matter between:

BOPLAAS
LANDGOED (PTY)
LTD
First Appellant
FRANS
JACOBUS VAN DER MERWE
Second Appellant
and
JACOB
JONKIES
First Respondent
ANNA
JONKIES
Second Respondent
GRIET
KALMEYER
Third Respondent
AND
ALL OTHER PERSONS RESIDING WITH
THE
FIRST TO THIRD RESPONDENTS AT THE
FARM
PREMISES ON DANKBAAR FARM
Fourth Respondent

JUDGMENT

MEER AJP

- [1] This is an appeal against a decision of the Ceres Magistrates Court, dated 29 October 2010. The Magistrate dismissed an application by the Appellants for a mandatory interdict in terms of Section 19 (1) (b) of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) to relocate the Respondents, who are long term occupiers on the Appellants’ farm, to houses allocated to the Respondents by the Witzenberg Local Municipality (“the Municipality”). The court a quo upheld a point in limine by the Respondents to the effect that the relocation would amount to an eviction, and dismissed the application.
- [2] The Appellants contend on appeal that the attempt at relocation does not ‘offend the common law remedy of relocation as confirmed by the Supreme Court of Appeal’. Alternatively, they contend that the common law remedy of relocation, as they referred to it, must be developed to include relocation from a farm to another dwelling off the land allocated to them by the State, in this case pursuant to the Housing Act 107 of 1997 (“the Housing Act”). They further contend that the court a quo erred in finding that the relocation constituted an eviction.

[3] The First and Second Respondents have acquired the status of long term occupiers, as described in Section 8 (4) of ESTA,[1] on the Appellants' farm, Dankbaarheid, in the Western Cape. They are aged 73 and 70 respectively. They commenced employment on the farm in October 1994 and were given the right to occupy a labourer's house by the previous owner. The First Respondent

was employed as a truck driver and the Second Respondent as a general labourer. They worked on the farm for over twenty years until their retirement. In the case of the First Respondent this occurred at the age of 69, at the request of the farm management, by which stage he had been an employee on the farm and had lived there for approximately 25 years. Having been on the farm for 10 years, and having attained the age of 60, the Respondents had obtained the status of long term occupiers under Section 8 (4) of ESTA, whose right of residence may not be terminated unless they had committed a breach as contemplated in section 10 (1) (a), (b) or (c).[2] In August 2016 the First Respondent received a certificate for rendering employment services to the farm for twenty years. The Third Respondent is their daughter, who has been living in her parents' dwelling since 1994.

[4] In November 2016, the Appellants bought the farm and acknowledged the status and rights of residence of the First and Second Respondents as long term occupiers, and that of the Third Respondent as an occupier with consent to reside with her parents. In October 2019 the Appellants attended a meeting on the farm in which the terms and conditions of their continued residence as long term occupiers were explained to them. They received copies of the housing agreement, but were not required to sign it, and they contend that no housing agreement was entered into.

[5] During 2020 it came to the knowledge of the Appellants that the First and Second Respondents had been allocated a house by the Witzenberg Local Municipality and that the Third Respondent had been allocated a separate house. The Respondents are owners of their respective properties. The Appellants sought the relocation of the Respondents to the houses owned by them, and several meetings were held to secure their amicable relocation. These attempts came to naught and during 2021 the Appellants instituted proceedings to compel their relocation.

[6] In their founding affidavit the Appellants contended, inter alia, that:

6.1 It could not have been the intention of the legislature for their rights of residence to continue indefinitely in the face of their stronger right or title in the form of ownership;

6.2 The Respondents had no further need for housing on the farm;

6.3 The Respondents cannot continue to reside on the farm free of charge when they have their own property;

6.4 The suitability of the municipal housing allocated to the Respondents cannot be in dispute when compared to the house consisting of 3 bedrooms, a bathroom living room and kitchen they currently occupy. By relocating to their own property, the Respondents' dignity will not be impaired;

6.5 The Appellants need the premises occupied by the Respondents for current employees who are in dire need of accommodation;

6.6 The Appellants' right to ownership is being frustrated.

[7] The Respondents raised two points in limine:

7.1 The first of these was that the application for relocation was a veiled eviction, given that their removal off the land was being sought and that as long term occupiers who were not in material breach, they were protected from eviction.

7.2 The second point in limine, which they labelled 'Constitutional Considerations', opposed the argument raised by the Appellants that the Respondents' right to housing in terms of the Housing Act is stronger than their rights as long term occupiers under ESTA. The security of long term tenure rights under ESTA was independent

from the right to housing in the Housing Act. They furthermore went on to contend that these constitutional arguments fell outside the jurisdiction of the Magistrates Court.

[8] On the merits, the First Respondent's answering affidavit averred that the municipal property was not suitable to the needs of his family. Three adults and three minors live in the house on the farm. The Second Respondent is bedridden and his daughter and granddaughter are her carers, who feed, bath and dress her. A relocation would not be suitable to their needs and might result in the family being split up and deprived of the family life they know. The family would be overcrowded if they moved to the municipal property, which is ten times smaller than the house they occupy, and which cannot accommodate their furniture. An offer from the Appellants to store their furniture was not helpful, as they wish to utilise their furniture. The First Respondent disputed that the house they occupy was needed for another employee, stating that all truck driver employees have houses on the farm. This was denied in reply.

[9] In reply the Appellants inter alia refuted the contention that the application was a veiled eviction, and noted that the Respondents remained silent on the fact that they were combinedly allocated two municipal houses, the combined size of which surpassed the size of the house on the farm. The Respondents, it was contended, thus had no just and equitable reason why they should not relocate to their own alternative accommodation.

Court a quo

[10] The court a quo adjudicated the first point in limine in the Respondents' favour, and with reference to relevant case law found that the relocation of the Respondents would amount to an eviction if granted. As aforementioned, the application was dismissed on this basis. Apropos the second point in limine, the court a quo accepted that it lacked the requisite jurisdiction.

On Appeal

[11] Mr Montzinger, for the Appellants, submitted that the SCA in *Oranje and Others v Rouxlandia Investments (Pty) Ltd*[3] ("*Rouxlandia*") had extended the principles relating to relocations beyond relocation from one dwelling to another on the same land. In this regard he relied on the following extract from the judgment, at paragraph 18:

'... The Constitutional Court has acknowledged that the right of residence conferred by s 8 of ESTA is not necessarily tied to a specific house. The protection afforded by those parts of ss 5 and 6 of ESTA on which the appellants rely, is to ensure that an occupier will not be subjected to inhumane conditions violating human dignity. To this extent, an occupier's right to resist relocation is protected. But these sections do not amount to a blanket prohibition on relocation under any circumstances. If indeed the relocation were to impair an occupier's human dignity, then the provisions of s 5 and s 6 would apply and the occupier could invoke his or her constitutional rights. This does not mean that all relocations necessarily suffer the same fate.' (Internal footnote omitted.)

He submitted that the above quotation appears to make a finding on relocations in general and postulates a relocation under any

circumstances, including relocation off the land as in the present case. I disagree. Read in context the extract states that sections 5 and 6 prohibit relocations when human dignity is impaired, and is certainly not authority in support of a relocation off the land. In

fact *Rouxlandia* explicitly confirmed, at paragraph 10, citing *Chagi v Singisi Forest Products (Pty) Ltd*[4] ("*Chagi*") with approval, that an eviction in terms of ESTA is confined to an eviction from the land, not from one dwelling to another.

[12] It is settled law that a relocation in terms of ESTA is the removal from one housing unit to another on the same farm, and that removal off the land or farm, as in the instant case, is an eviction. In *Pharo's Properties CC and Others v Kuilders and Others*[5] at paragraph 13, this court found that relocation in terms of ESTA was movement from one housing unit to another on the same registered

farm. A similar finding was made in *Drumearn (Pty) Ltd v Wagner and Others*[6] at 504F, and in *Mjoli v Greys Pass Farm (Pty) Ltd*[7] at paragraph 11. The Supreme Court of Appeal has confirmed this. In *Chagi*, at paragraphs 19 and 20, it was similarly held that a relocation from one house to another on the same land does not constitute an eviction. Likewise in *Rouxlandia* where, as aforementioned, with reference to *Chagi*, it was held that an eviction in terms of ESTA is confined to an eviction from the land, not from one dwelling to another.

[13] Mr Montzinger submitted that in the event of our accepting that a relocation is limited to movement on the same land, as we have, then a development of what he referred to as the ‘common law remedy of relocation’ is necessary to define the removal of an occupier off a farm in a case such as this where the State has allocated an occupier a house which the occupier now owns, as a relocation and not an eviction. The ‘common law remedy of relocation’, he submitted, was – absent such a development – inconsistent with the Constitution. (Appellants’ heads of argument, para 41.) It had not kept up with the changing landscape of farm evictions and provision of housing by the state, and how a landowner protects their rights in terms of Section 6 of ESTA or Section 25 (1) of the Constitution, if an occupier has security of tenure on their land and also a stronger right to property ownership and security of tenure off the land. Such a development, he submitted, will apply to a very specific set of circumstances and will not impact other categories of occupiers’ rights to security of tenure.

[14] What Mr Montzinger refers to as a common law remedy of relocation, is in fact the interpretation of the definition of ‘eviction’ as contained in Section 1 of ESTA in the cases mentioned in paragraph 12 above. There, the judicial interpretation of ‘eviction,’ as endorsed by the SCA, confines an eviction to a removal off a farm and a relocation to a removal from one dwelling on a farm to another. The exercise engaged in by the courts was judicial statutory interpretation, which is binding. There was no pre-existing common law remedy of relocation emanating from our courts which was

considered in the judgments referred to above at paragraph 12, at least independent of the law of contract. In those cases, ESTA was considered.

[15] What Mr Montzinger in essence contends for is an extended qualified interpretation of eviction in s 1 of ESTA, to exclude the circumstances at play in this case from the definition of eviction, or the inclusion in ESTA of a definition of relocation favourable to the Appellants’ stance. He conceded as much. We are unable to oblige, not least as to do so would require us to go against SCA precedent, which we cannot do.

[16] I pause to mention also, apropos the common law, that it is undisputed that the Respondents are ESTA occupiers. They are thus not persons with an income in excess of the prescribed amount of R13 625,[8] who are excluded from the definition of occupier under Section 1 of ESTA, and in respect of whom the common law would apply.

- [17] The specific set of circumstances at play in this matter is the right to security of tenure endorsed in section 6 (2) (a) of ESTA, of two long term occupiers, who are protected from eviction in terms of Section 8 (4) save in the case of material breach, as well as the security of tenure of an occupier by consent, being the Third Respondent.
- [18] Section 6 (2) (a) of ESTA asserts the right of security of tenure of occupiers, balanced with the rights of the owner, as do Sections 8
- (1) and 8 (4) which apply to the Respondents.
- [19] The remedy contended for by the Appellants would trample upon their security of tenure, and be in conflict with Sections 8
- (1) and 8 (4) of ESTA, both of which sections are cognisant of the rights of the landowner as well. It would, opportunistically in this case, secure their eviction by avoiding the protections afforded to them in terms of Section 8. It goes without saying that this would be at odds with the spirit and purport of both ESTA and the Constitution.
- [20] Finally, it needs to be emphasized that the rights the Respondents have acquired as occupiers reside under ESTA, and are independent of their rights under the Housing Act, however those rights might compare. The deprivation of their rights under ESTA may only occur within the ambit of ESTA. This court is confined to the parameters of ESTA to determine whether a relocation or eviction application may be granted, as indeed was the court a quo. The court a quo correctly, with regard to the case law, found that the application sought was in fact an eviction. The challenge to the continued
- residence of the Respondents on the Appellants' farm stands to be brought in terms the provisions of Section 8, and other eviction provisions of ESTA. The balancing of the Appellants' rights as against those of the Respondents in the particular circumstances of this case, must be considered in that context.
- [21] In view of all of the above, the appeal cannot succeed. In accordance with the practice of this court not to grant costs unless there are exceptional circumstances, of which I find there to be none, I intend making no order as to costs. I accordingly order as follows:

The appeal is dismissed.

Y S MEER

Acting Judge President

Land Claims Court

I agree.

S J COWEN

Judge

APPEARANCES

For the Appellants:

Adv. A Montzinger

Instructed by:

Otto Theron Attorneys Inc.

For the Respondents:

Adv. L Adams

Instructed by:

John PJ Sauls Prokureurs

[1] Section 8 (4): ‘The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and – (a) has reached the age of 60 years; or (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge, may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.’

[1] Section 8 (4): ‘The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and –

(a) has reached the age of 60 years; or

(b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,

may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.’

[2] ‘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 month’s 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; . . .’

[2] ‘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 month’s 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; . . .’

[3] 2019

(3) SA 108 (SCA)

[4] 2007

(5) SA 513 (SCA).

[5] 2001

(2) SA 1180 (LCC).

[6] 2002

(6) SA 500 (LCC), at 504F.

[7] [2019] ZALCC 25 (15 October 2019).

[8] ‘Definitions.--

- (1) In this Act, unless the context indicates otherwise— “occupier” means . . . (c) a person who has an income in excess of the prescribed amount; . . .’ Schedule A of the regulations to ESTA, item 2: ‘(1) The prescribed amount for the purposes of paragraph (c) of the definition of “occupier” in section 1 (1) of the Act shall be an income of R13 625.00 per month.’

[8] ‘Definitions.--

- (1) In this Act, unless the context indicates otherwise—

“occupier” means . . .

(c) a person who has an income in excess of the prescribed amount; . . .’

Schedule A of the regulations to ESTA, item 2:

‘(1) The prescribed amount for the purposes of paragraph (c) of the definition of “occupier” in section 1 (1) of the Act shall be an income of R13 625.00 per month.’

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