

SOUTH AFRICA / JUDGMENT

Cillie N.O and Others v Volmoer and Others (956/2013) [2016] ZALCC 5 (15 February 2016)

[2016] ZALCC 5

COURT

Land Claims Court

BEFORE

Baloyi AJ

CASE / FILE NUMBER

956/2013

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA
(RANDBURG)

CASE

NUMBER: LCC50R/2015 MAGISTRATE COURT

CASE

NUMBER: 956/2013

Decided

on: 15 February 2016

In

chambers

In

the review proceedings in
the case between:

CHRISTINA

FRANCINA CILLIE N.O In her capacity as trustee of

JOHAN

CILLIE

TRUST.....1st

Applicant

KWEPERFONTEIN

LANDGOED (EDMS)

BPK.....2nd

Applicant

DEON

BRIEDENHANN.....3rd

Applicant

And

WILHELM
DENNIS
VOLMOER.....1st
Respondent
ELSIE
SEPTEMBER.....2nd
Respondent
WITZENBERG
MUNICIPALITY.....3rd
Respondent
PROVINCIAL
DIRECTOR, DEPARTMENT OF
LAND
AFFAIRS.....4th
Respondent

JUDGMENT

BALOI AJ

Introduction

- [1] This matter comes before this court by way of automatic review in terms of section 19 (3) of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”).
- [2] Johan Cillie Trust is the owner of the farm Kweperfontein, Portion 5 (part of Portion 3) of the farm Ezelfontein No.384, Ceres, Western Cape (“the farm”). Christina Francina Cillie is a trustee of Johan Cillie Trust (the first applicant). The Second Applicant leases the farm from the First Applicant and conducts farming on the farm. The Third Applicant is responsible for the day to day farming activities on the farm.
- [3] The Applicants applied to the magistrate court: Ceres, for the eviction of the Respondents from the farm. They rely on section 8 of ESTA. The application was not opposed by the Respondents and on 15 April 2015 the magistrate granted an order that the Respondents vacate the farm by 30 June 2015, failing which, the Sheriff must evict them on 3 July 2015. The order is made subject to confirmation by this court.

Relevant background

facts

- [4] I summarise the relevant evidence as appears from the Applicants' papers:

4.1 The First and Second Respondents are husband and wife. The First Respondent is 36 years of age and the Second Respondent is 32 years of age. They have two dependent children, whose ages are not apparent from the papers. The First Respondent has lived and worked on the farm since 2 February 2004 and the Second Respondent came to live with the First Respondent and to work on the farm at some point before 22 September 2008.

4.2 The Respondents' written contracts of employment stipulate that they will live on the farm as long as they remain employed by the Second Applicant. In addition, a written lease agreement entered into between the Applicants and the First Respondent states that the lease agreement will terminate when the First Respondent ceases to be employed on the farm. There is no similar lease agreement with the Second Respondent.

4.3 On 7 October 2010, the First Respondent was dismissed from employment following a disciplinary hearing involving misconduct of being drunk on duty, assault and attempted assault. Following the dismissal, the First Respondent referred a dispute of unfair dismissal to the Commission for Conciliation

Mediation and Arbitration ("the CCMA") in terms of the Labour Relations Act 66 of 1995 ("LRA") and on 16 November 2010, he withdrew the dispute. The CCMA has issued a certificate to that effect. Accordingly, there is no dispute between the Applicants and the First Respondent pertaining to his dismissal. In the result, all issues pertaining to the First Respondent's employment and the dismissal is final.

4.4 The First Respondent's right of residence terminated upon his dismissal and in the aftermath of his dismissal from employment, he was permitted and continued to live on the farm with the Second Respondent by virtue of their relationship as husband and wife.

4.5 On 20 November 2012, the Second Respondent was also dismissed from employment following a disciplinary hearing for misconduct involving absence from work without leave, being drunk on duty and misuse of a doctor's certificate. The Second Respondent has not referred a dispute in terms of the LRA, arising from her dismissal and accordingly her dismissal is final. On the same day of her dismissal, Third Applicant issued the Second Respondent with a notice in terms of the "Sectoral Agreement 13: Farmworkers Sector", clause 28(2), to vacate the house by no later than 30 January 2013. The notice is signed where indicated for the Second Applicant and Second Respondent and reads as follows:

"30 DAE KENNISGEWING"

Kennisgewing tussen:

Kweperfontein Landgoed

(Hierna genome die EIENAAR)

En

Elsie September

(Hierna genome die WERKNEMER of sy VERTEENWOORDIGER)

Ingevolge Artikel 28(2) van die Sekotrale Vasstelling 13: Piaswerkers Sektor, sal 'n werknemer wie se dienste beeindig word binne dertig (30) dae die akkommodasie van die eienaar ontruim.

Aangesien u verblyfsreg beeindig het, word u hiermee kennis gegee om die huis wat u tans bewoon teen nie later as 30/1/2013 te intruim.

U word verder in kennis gestel dat u onder geen omstandighede gedurende hierdie tydperk enige ander geboue op die plaas mag betree nie en geensins inmeng in die daaglikse verloop van aktiwiteite of die plaas nie.”

4.6 It was always the policy on the farm that a worker will only live on the farm if she is employed on the farm. This is an old custom on all the surrounding farms and in the farming sector as a whole.

[5] As I have already stated, the First and Second Respondents are not participating in these proceedings. Accordingly, the evidence of the Applicants is unrefuted and accordingly stands.

Have the requirements for eviction been satisfied?

[6] Section 9(2) sets out what has been described as “prerequisites” for the granting of such an order. It 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

(Hi) 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.”

- [7] It is to be noted that the court has the discretion whether to grant an order of eviction even where the prescribed requirements are all present[1]. On the other hand, a failure to meet any one the requirements listed in section 9(2) must result in the refusal of an order[2].
- [8] The Sectoral Determination 13: Farmworkers Sector is a determination issued by the Minister of Labour in terms of the LRA “Sectoral Determination). It regulates the conditions of employment for farmworkers. Clause 28(2) thereof reads as follows:

"28. Accommodation, Livestock and Crops on Termination

- (2) If the farm worker resides in accommodation on the premises of the employer or that is supplied by the employer; the employer is required to provide the farm worker with accommodation for a period of one month, or if it is a longer period, until the contract of employment could lawfully have been terminated "
- [9] Clause 27(6) of the Sectoral Determination provides that “(.njoything in clauses 26, 27, 28 and clause 29 of this determination affects the rights of farmworkers accrued in terms of any land reform processes”. Accordingly, the eviction of the Respondents must comply with the requirements of ESTA.

Compliance with section 9(2)(a) and (b)

- [10] The Applicant seeks the eviction of the Respondents on the ground that their right of residence was terminated in terms of section 8 of ESTA.

[11] Section 8(1) of ESTA provides that -

“(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 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.”

[12] The Applicants rely on the termination of the Second Respondent’s employment for the termination of her right of residence. Her employment contract does not state that her right of residence will end with the termination of her employment on the farm. Presumably in recognition of this fact, the Applicants rely, in the notice to the Second Respondent to vacate farm, on the Sectoral Determination, clause 28(2) to terminate the Second Respondents residence on the farm and to call on her to leave the farm. The notice in terms of the Sectoral Determination, in my view, serves the requirement and purpose of section 9(2)(a). The First and Second Respondents have been afforded more than 30 days to vacate the premises. I am satisfied that the Applicants have a basis

in law to terminate the Respondents’ right of residence.

Compliance with section 9(2)(c)

[13] The Respondents have lived on the farm since 2004. Section 10 regulates the eviction of an occupier who has lived on the property after February 1997 and section 11 regulates that of an occupier who has lived on the property after 1997. Accordingly, section 11 of ESTA applies. Section 11 provides:

“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. ”

[14] As the Applicants do not rely on the effluxion of time for the termination of the right of residence and eviction of the First and Second Respondent, section 11(1) is not applicable. It follows that section 11 (2) is of application.

[15] The First and Second Respondents have resided on the farm for a combined period of 11 years (First Respondent since February 2004), the Second Respondent for 7 of that 11 years (since September 2008). The contractual term that the Second Respondent, and those who occupy through her, will continue to reside on the farm as long as she is employed on the farm, as countenanced in the Sectoral Determination referred to above, is fair. The reason for termination is not inherently unfair - the Second Respondent is no longer employed by the Applicants and the Applicants require the house to accommodate its employees.

[16] Whilst the Applicants allege that the First and Second Respondents are employed elsewhere and will be able to procure suitable alternative

accommodation, they have not placed any evidence about or of the availability of such alternative accommodation. This is notwithstanding that the Applicants, in the founding affidavit, state that they will obtain information from the municipality about the availability of alternative accommodation. A report in terms of section 9(3) which must address, inter alia, the availability of alternative accommodation and in that regard would be of assistance to the magistrate was not filed. In the

result, the magistrate did not and understandably, could not, meaningfully consider and determine the availability of alternative

accommodation as he is enjoined to do by section 11 of ESTA. Whilst it is correct that the requirement of availability of suitable

alternative accommodation is not inflexible, I am also mindful of and persuaded by the Constitutional Court caution that “a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable

alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme”[3]. It is fair to accept that the Respondents are settled on the farm for a fair amount of time. Accordingly, proper consideration should have been given to the availability of alternative accommodation. This was not done. I am well aware and it certainly does not follow that if it is found that there is no suitable alternative accommodation available to them and their dependent children, an order for eviction will be refused on that ground alone. The court is required to and must balance the interests of the parties in determining whether or not to grant the order. To borrow from Gildenhuys AJ (as he then was) in *Landbouontwikkelingsbank van Suid-Afrika v Conradie*[4], the facts of each particular case will determine the result, viz, whether a termination of an occupiers right of residence was just and equitable.

Compliance with section 9(2)(d)

[17] The Applicants have issued notices in terms of section 9(2)(d)(ii) to the Witzenberg Municipality and to the Department of Land Affairs and accordingly, I agree with the finding of the magistrate that section 9(2)(d) has been complied with.

Compliance with section 9(3)

[18] There is no Probation Officer's report as required by section 9(3). It is necessary to make and emphasize the point that a Probation Officer's report is not a mere formality. As Gildenhuys J noted in *Westminster Produce (Pty) Ltd t/a Elgin Orchards 1/ Simons and another*[5], the report is required for the purposes of section 9(2)(c). The importance of this report to the consideration of an eviction application cannot be over-stated. The report ensures that the constitutional rights affected in an eviction, including the rights

and interests of the land owner, are not overlooked. The issues that the Probation Officer is required to address will assist a court in its determination of whether an eviction is just and equitable in the circumstances[6]. This is evident from the prescribed issues that the Probation Officer's is required to address in the report.

[19] In the absence of the report required by section 9(3) and evidence about the issues that would otherwise be addressed in the Probation Officer's report, in particular, the availability of suitable alternative accommodation, how the rights of the minor children will be affected and the hardship that will be caused to the parties if the order is granted or refused, it is not possible to determine whether the eviction of the Respondents is just and equitable in the circumstances. This is fatal to the application.

In the premises, the application for eviction should have been refused.

Finding

[20] I find that the requirements for eviction as set out in section 9(2)(c) of ESTA have not been satisfied. It follows that the order of the magistrate must be set aside.

Order

[21] In the result, I make the following order:

21.1 The order of the magistrate is set aside.

21.2 The matter is remitted to the magistrate to -

- (a) Obtain a report in terms of section 9(3) and to consider the issues prescribed in section 9(3).
- (b) The magistrate is to consider whether the requirements of section 9(2)(c) have been complied with, taking into account the factors listed in section 9(3).

21.3 An order for eviction must be referred to this court for review in terms of section 19(3) of ESTA.

BALOYI AJ

- [1] Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 CC
 - [2] Lategan v Koopman en Andere 1998 (3) SA 457 (LCC) at paragraph 8
 - [3] Supra note 1 above at paragraph 28
 - [4] 2005 (4) SA 506 (SCA) at paragraph 9
 - [5]
 - [2000] 3 All SA 279 LCC para 5
 - [6] Valley Packers Co-operative Ltd v Dietloff and another [2001] 2 All SA 30 LCC, paragraph 7;
Glen Elgin Trust v Titus and another [2001] 2 All SA 86 LCC
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