

SOUTH AFRICA / JUDGMENT

Daniels and Others v M and Y Tombstone Granite Works (Pty) Ltd and Others (LCC161/2022) [2023] ZALCC 19 (23 March 2023) [2023] ZALCC 19

COURT
Land Claims Court

BEFORE
Ncube

CASE / FILE NUMBER
LCC161/2022

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REPUBLIC OF SOUTH
AFRICA
IN THE LAND CLAIMS
COURT OF SOUTH AFRICA
HELD AT RANDBURG
CASE NO: LCC161/2022
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
NOT REVISED
23.03.23
In

the matter between: LORRAINE
DANIELS
First
Applicant
GAVIN
DANIELS
Second
Applicant
LINDSAY
BRITTON
Third
Applicant
LORRENTIA
DANIELS
Fourth

Applicant
(And
all those holding title under The 1st
to 3rd
Applicants)
Fifth
Applicant
And
M&Y
TOMBSTONE GRANITE WORKS (PTY) LTD
First
Respondent
DEPARTMENT
OF RURAL DEVELOPMENT AND LAND REFORM
Second
Respondent
THE
CITY OF CAPE TOWN MUNICIPALITY
Third
Respondent

JUDGMENT

NCUBE J

Introduction

[1] This is an application for restoration of residence in terms of section 14 of the Extension of Security of Tenure Act, Act 62 of 1997 (“the Act”). The application is opposed. It was brought on urgent basis. I dispensed with the rules relating to form, service and time lines and issued directives for filing of affidavits. In terms of the directives, the first respondent was supposed to file and deliver its Notice to Oppose and the answering affidavit on or before 23 November

2022. The answering affidavit was only filed on 16 December 2022, hence the application for condonation.

Condonation

[2] The first respondent filed its answering affidavit 21 days late. It was filed on 14 December 2022. In terms of the Rules, the court may, on sufficient cause shown, excuse the parties from compliance with the Rules. The legal principles relating to condonation were analysed in *Melane v Santam Insurance Co Ltd*[1]:

Holmes JA said:

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts, are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate the rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a light delay and good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interests in finality must not be overlooked.”

- [3] In casu, the first respondent avers that the delay was caused by the fact that the first respondent first attempted a settlement agreement with the applicants. The applicants rejected the agreement. Secondly, the first respondent assisted, the applicants to find alternative

accommodation; which accommodation was also rejected by the applicants. The representatives of the first respondent Beverley Janine Naidoo (“Ms Naidoo”) avers firstly that the first respondent, as a church and a grave yard, is extremely busy with burials and exhumations and did not have time to consult with her legal representative. This is not acceptable explanation. It is proof that Ms Naidoo does not take this court seriously.

- [4] There was not even a need for her to engage into negotiations with the applicants before she could respond to court directives. It seems Ms Naidoo’s funerals and exhumations were more important than this court. The rule of law requires citizens to respect the authority of the courts. This condonation application is opposed by the applicants and rightly so and it should be dismissed. However, as I want to deal with the merits of this application once and for all, I shall exercise my discretion and condone the late filing.

Factual Background

- [5] The second applicant (“Mr Daniels”) was employed by the first respondent in 2018 as a grave digger and for the manufacturing of tombstones. Mr Daniels was given consent to reside on the premises described as Farm 821 Erf 821 Portion 3, Williston Road, a Division of Cape Road, Cape Town. He moved into the premises with members of his family being the first, third, fourth and fifth applicants. The first respondent subsequently became aware of the fact that Mr Daniels was then staying with his family members on the property. Mr Daniels’ initial employment period was for six (6) months.
- [6] When the period of six months expired and the employment terminated, Mr Daniels and family continued residing on the property as occupiers. This was with the consent of Ms Naidoo who gave them the additional period of ten

- [10] months. In October 2021, the first respondent commenced proceeding in this court for the eviction of Mr Daniels and his family members. The eviction application is opposed and it still pending, in this court.
- [7] On 23 October 2022, the applicants were threatened at gunpoint by certain people and forced to leave the property. Realizing that their lives were in danger, the first applicant ("Mrs Daniels") requested Mr Daniels to try and seek alternative accommodation for the family the following day. On the following day, the same people returned at night and informed the applicants that it was the last warning and they had to leave the property. On 25 October 2022 the applicants left the property. They went to a friend's ("Mr Peter") place in Mannenburg where Mr Peter provided them with a one room accommodation. On 26 October 2022 the first respondent demolished the house which had been occupied by the applicants, leaving the applicants with no shelter over their heads.
- [8] On 15 November 2022, the applicants issued a Notice of Motion in this court, seeking restoration of residence pending outcome of the pending eviction application. The application was brought on urgent basis. I condoned non-compliance with the rules relating to form, service and time lines. I issued directives with regard to the filing of affidavits and other documents. I ordered the first respondent to find alternative accommodation for the applicants in the meantime. The first respondent secured a shack at the informal settlement as alternative accommodation for the applicants. The applicants rejected the shack as it did not constitute suitable alternative accommodation.

Issues

- [9] The main issue to be decided is whether the first respondent evicted the applicants from the property and demolished the building they were occupying without a court order. Ms Naidoo, person in charge of first respondent, deposed to an answering affidavit and denied that the applicants were evicted without a court order. She also denied that the house was demolished whilst the applicants were still in occupation. According to Ms Naidoo, the applicants, on several occasions approached her asking for money for relocation or they voluntarily left the property after they had been threatened by certain people. According to Ms Naidoo, the house was demolished

because it was then vacant and being used by criminals for their criminal activities.

Discussion

- [10] This is just another example of the plight of landless people of South Africa. In terms of section 26(1) of the Constitution of the Republic of South Africa Act[2] everyone has a right to have access to adequate housing. In terms of section 26(3), no one may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances and no legislation may permit arbitrary eviction. It is the State which is enjoined to take legislative and other measures to achieve progressive realization of the right to housing[3], but within its available resources.

- [11] In realization of a right to adequate housing, parliament enacted the Extension of Security of Tenure Act[4] (“ESTA”). The long title to ESTA describes the purpose of ESTA as:

“to provide for measures with State assistance to facilitate long-term security of land tenure, to regulate the condition of residence on certain land; to regulate conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right to residence has been terminated, may be evicted from land; and to provide for matters connected therewith.”

- [12] In *Department of Land Affairs and Others v Goedgededen Tropical Fruits (Pty) Ltd*[5] the Constitutional Court held that ESTA is remedial legislation, which is umbilically linked to the Constitution. What is most relevant is that the Constitution prohibits the demolition of a person’s home without a court order, which is granted after considering all the relevant circumstances. To that end, no one is mandated to take the law into his or her own hands, not even the owner of the land on which the occupier resides. The applicants were resident on the property with consent of the person in charge, Ms Naidoo. Therefore, the applicants enjoyed protection under ESTA.

- [13] Section 14 of ESTA provides:

“14 Restoration of residence and use of land and payment of damages-

- (1) A person who has been evicted contrary to the provisions of this Act may institute proceedings in a court for an order in terms of subsection (3).
- (2) A person who-
 - (a) would have had a right to reside on land in terms of section 6 if the provisions of this Act had been in force on 4 February 1997; and
 - (b) was evicted for any reason or by any process between 4 February 1997 and the commencement of this Act, may institute proceedings in a court for an order in terms of subsection (3).
- (3) In proceedings in terms of subsection (1) or (2) the court may, subject to the conditions that it may impose, make an order-
 - (a) for the restoration of residence on and use of land by the person concerned, on such terms as it deems just;
 - (b) for the repair, reconstruction or replacement of any building, structure, installation or thing that was peacefully occupied or used by the person immediately prior to his or her eviction, in so far as it was damaged, demolished or destroyed during or after such eviction;
 - (c) for the restoration of any services to which the person had a right in terms of section 6;
 - (d) for the payment of compensation contemplated in section 13;

- (e) for the payment of damages, including but not limited to damages for suffering or inconvenience caused by the eviction; and
- (f) for costs.
- (4)
- (a)
- (b)
- (i)
- (ii)”

[14] It is evident that there are at least three disputes of fact in this matter but they are not material. Those disputes relate to the reason for the applicants to vacate the property, whether the applicants requested Ms Naidoo for financial assistance to leave and lastly, whether the applicants were still in occupation of the house when it was demolished. The fact of the matter is that the applicants’ accommodation was demolished without a Court Order. Ms Naidoo knew very well that there was a pending eviction application. Ms Naidoo was supposed to contact her attorney and report that the applicants were asking for money and ask for advice. Even if it is true that the applicants had vacated the house, Ms Naidoo was not supposed to demolish the house without first seeking legal advice from her attorney.

[15] On the question of suitable alternative accommodation, there is evidence that the parties tried to get alternative accommodation. The applicants rejected the accommodation. From the photographs attached to the papers, there is no doubt that the accommodation which was identified as suitable alternatives accommodation was not suitable at all. The said accommodation was in the informal settlement, which is different from the property where the applicant was resident before. The demolished house was built of bricks compared to a shack at the informal settlement.

[16] ESTA defines “suitable alternative accommodation” thus:

“Suitable alternative accommodation

means alternative accommodation which is safe overall not less favourable than the occupiers’ previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regards to-

- (a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
- (b) their joint earning abilities; and
- (c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active.”

[17] From the above definition, it is crystal clear that the so called alternative accommodation was definitely not suitable. Amongst the occupiers there were school going children and sick people who need chronic medication. There is no indication that there were schools and clinics in the nearby vicinity. In the ordinary course of events, the first respondent should be ordered to rebuild the demolished house on the same property where it was. However, parties agree that rebuilding is not an option because of criminals. Crime is rife in the area. The boundary wall is destroyed. Criminals have free access to the property and they steal building material. The only valuable option, is to build or secure alternative accommodation for the applicants somewhere.

Costs

[18] The practice in this court is not to make costs awards unless there are exceptional circumstance justifying an award of costs. In the present case, there are no such exceptional circumstances.

Order

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

1. Noncompliance with the Rules relating to form, service and timelines is condoned and the application is dealt with as one of urgency.
2. The application is granted.
3. Pending the finalization of the application in case number LCC193/2021, the first respondent is ordered to provide suitable alternative accommodation to the applicants, which accommodation must be of the same size and standard as the accommodation that was occupied by the applicants prior to the demolition of that house which was situated at Portion 3 of farm 82; Williston Road, a division of Cape Road, Cape Town.
4. The Second respondent is ordered to approve the alternative, accommodation secured by the first respondent in the event of the applicants and the first respondent disagree on the standard of the accommodation.
5. In the event of the first respondent failing to secure suitable alternative accommodation, the first respondent is hereby ordered to pay financial compensation to the applicants. The amount of such compensation shall be sufficient to cover the costs of building a house of the size of the house which was previously occupied by the applicants before demolition.
6. The amount of financial compensation shall be determined by the second respondent after assessing the building plan of the demolished house.
7. The first respondent is ordered to show the building plan of the demolished house to the second respondent.

8. In case the building plan is not available the second respondent shall determine the amount of compensation in accordance with the market value of the houses of the same size as the house which was occupied by the applicants prior to demolition.

9. There is no order as to costs.

M T Ncube

Judge: Land Claims Court of South Africa

Date of hearing: 23 January 2023

Judgment delivered: 23 March 2023

Appearances

For First to Fifth Applicants: Makua, C Instructed by: Legal Aid South Africa Wynberg For the First Respondent: Reid, R Instructed by: Reid Attorneys Cape Town For Second & Third Respondents: No appearance

[1] 1962

(4) SA 531 (A)

[2] Act 108 of 1996.

[3] Section 26 (2).

[4] Act No 62 of 1997.

[5]

[2007] ZACC 12; 2007

(6) SA 199 (CC)

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