

SOUTH AFRICA / JUDGMENT

Francois and Another v Ficks and Others (81/2023;) [2024] ZALCC 6 (29 January 2024) [2024] ZALCC 6

COURT

Land Claims Court

BEFORE

Y S Meer, M T Ncube

CASE / FILE NUMBER

81/2023

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

LCC CASE NO: 81/2023

MAG COURT CASE NO: 18/2021

Before: The Honourable Meer AJP and Ncube J

Heard on: 28 November 2023

Delivered on: 29 January 2024

In the matter between:

CALVIN FRANCOIS

First Appellant

LOEDIWIKUS THERON

Second Appellant

And

HENDRIK FICKS

First Respondent

ELSIE MEIRING Second Respondent

ALL PERSONS RESIDING WITH OR

UNDER THE FIRST

AND SECOND RESPONDENTS

Third Respondent

LAINGSBURT MUNICIPALITY

Fourth Respondent

DEPARTMENT OF LAND REFORM AND

RURAL DEVELOPMENT

Fifth Respondent

APPEAL JUDGMENT

MEER, AJP

[1] The Appellants appeal against the whole judgment and order of the Laingsburg Magistrates Court delivered on 30 March 2023, which refused an application for the eviction of the First and Second Respondents in terms of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) from the farm known as Konstabel[1] situated in Laingsburg, Western Cape.

[2] The farm is owned by the Calvin François Trust (“the Trust”) which bought it on 2 July 2019 from the insolvent estate of Rapid Trade 494 (Pty) Ltd. The First and Second Appellants are in charge of the day to day running of the farm. The farm was not bought as a going concern. The existing employees’ contracts, including those of the Respondents, were not taken over by the Trust. The Respondents were employed by the previous owner and have been residents on the farm since 2009, occupying labourer’s house No. 4, as a result of their employment with the previous owner. They refused an offer of employment from the Trust when it became owner of the farm, as appears more fully below. The Respondents are currently

employed on a neighbouring farm yet refuse to vacate the premises which they continue to occupy on the Trust’s farm. The Second Respondent is the common law wife of the First Respondent. They have no dependents residing with them.

[3] On 16 August 2019, after the trust acquired the farm, a meeting was held with all occupiers on the farm during which the Appellants offered employment to the employees of the previous owner, including the Respondents. Many employees accepted the offer of employment. The Respondents did not. Nor did they do so during subsequent meetings in November 2019 when the offer of employment was repeated.

- [4] In explanation of their rejection of the offer of employment, the answering affidavit of the First Respondent states that the employment contracts which were being offered by the Appellants were not the same as their previous employment contracts, in that there was no guarantee of a permanent position on the farm and female employees would not be employed, or alternatively that female employees such as the Second Respondent would be employed on a temporary/seasonal basis.
- [5] In reply, the Second Appellant states that the farm was bought on a liquidation auction and the liquidators terminated all the employment contracts. There was no obligation in law on the Appellants to re-employ any of the previous workers on any conditions. Logic however dictated, he states that from a business perspective it would be beneficial to re-employ the previous workers. Due to the fact that there were no cash crops planted on the farm at the time of purchase, and there were only permanent employment posts for male persons available, permanent positions for neither male nor female workers could have been offered. Such positions would become available “as the planting and harvesting of new cash crops arose.” At present, he states, the Appellants employ male and female permanent workers.
- [6] On 7 September 2020, the Respondents were invited to make representations as to why their consent to occupy their house should not be terminated. They did not respond. Thereafter, they received a notice on 7 October 2020 formally terminating their right of occupancy and pursuant thereto an application for their eviction was launched in the Laingsburg Magistrate Court. The application was dismissed on 30 March 2023, with the court a quo finding that the termination of the respondents’ rights of residence was not just and equitable.
- [7] In so finding, however the court a quo disquietingly, took no consideration whatsoever as it was required to do, of the provisions of section 9 read with section 8 (1) of ESTA. The latter subsection is applicable, as the Respondents were occupiers by consent, having resided on the farm openly and continuously and with the knowledge of the Appellants as contemplated in sections 3 (4) and
- (5) of ESTA[2] when the Trust became owner of the farm in 2019. The relevant Sections 9 and 8(1) of ESTA state as follows, respectively:
- “9. Limitation on eviction -(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.*
- (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 Land Affairs, 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 Land Affairs 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.

3) For the purposes of subsection 2 (c)), the Court must request a probation officer contemplated in section 1 of the Probation Services Act, 1991, (Act No. 116 of 1991), or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period –

(a) on the availability of suitable alternative accommodation to the occupier;

(b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;

(c) pointing out any undue hardship which an eviction would cause the occupier; and

(d) on any other matter as may be prescribed.”

“8. Termination of right of residence. —

(1) Subject to the provisions of this section. an occupier's right of residence maybe 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.”

[8] I now proceed to perform the exercise which the court a quo should have done.

Compliance with section 9(2)(a) of ESTA:

[9] As the Respondents were occupiers by consent, the factors set out at section 8(1) of ESTA, have relevance and ought to have been considered by the Court a quo.

[10] With regard to section 8(1)(a), there was no agreement between the owner and the Respondents for the latter’s continued residence on the farm. The Respondents were given an opportunity to be employed on the farm, an opportunity they declined. Given that the circumstances on the farm had changed, the Respondents were not entitled, in my view, to insist on the terms and conditions of their employment. In short there was no employment relationship between the Appellants and the Respondents. Nor was there any agreement in terms of which the Respondents could claim continued security of tenure on the property.

[11] With regard to section 8(1)(b), it is common cause that the owner sought to engage with the Respondents to offer them employment and to make representations before terminating their right of residence. The Respondents declined both offers.

[12] In respect of the factors set out at section 8(1)(c) and comparing the interests of the parties, it must be borne in mind that the Respondents have been living rent free on the Appellants’ property since 2019, whilst working elsewhere. This is prejudicial to the Appellants who cannot house their employees in the premises the Respondents occupy. The hardship to the Respondents should they be evicted is that they will be deprived of the rent free accommodation they currently enjoy.

[13] In respect of the factor at section 8(1)(d), there was no reasonable expectation of the renewal of the consent to occupy. With regard to section 8(1)(e) the Respondents were given an opportunity to make representations which they did not.

Compliance with section 9(2)(b)

[14] This section was complied with and the Respondents had not vacated the land within the period of notice given by the Appellants.

Compliance with section 9(2)(c)

[15] Section 11 of ESTA is applicable to the Respondents as they became occupiers after 1997. The section states:

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

[16] Section 11 requires me to consider whether it is just and equitable to grant an eviction order. Section 11 in essence mirrors section 8(1) save for section 11 (1)(c) which requires a consideration of whether suitable alternative accommodation is available. It is thus not necessary to deal with any of the other factors set out at section 11 save for that of suitable alternative accommodation.

[17] The Laingsburg Municipality, the Fourth Respondent filed a report dated 4 May 2022 indicating that the Respondents were not on their housing waiting list and that the Municipality currently did not have emergency or alternative accommodation available. At the hearing of the appeal, this Court ordered the municipality to file an updated report by 14 December 2023 on the current emergency / alternative accommodation situation. I am indebted to the Municipality for filing the report timeously.

[18] The report reiterates that the Respondents are not on the Municipal Housing waiting list and that there is no alternative housing available. On the question of emergency housing, the report states that the Municipality will provide accommodation in case of a disaster incident and that the Municipality was fortunate in that it did not have to provide emergency housing over the past 15 years for disasters such as flooding. This suggests to me that the Municipality has the capacity to provide emergency housing. The report however, curiously concludes with the contradictory statement: “The Municipality currently do not have any emergency housing available.”

[19] Our Courts have recognized the obligation on the state to provide emergency accommodation. In *Government of the Republic of South Africa and Others v Grootboom and Others*[3] it was acknowledged at para 96 that the obligation imposed by Section 26 (2) of the Constitution includes the obligation to fund, implement and supervise measures to provide relief to those in desperate need. Paragraph 2 (b) of the Grootboom order recognized the provision of relief to inter alia those who have no roof over their heads, no access to land or who are in crisis situations. In *Occupiers of Erven 87 and 88 Berea v*

Christiaan Frederic De Wet N.O and Another[4] at paras 61-62, the Court held that once it is established that there is a risk of homelessness, the duty of a municipality to provide temporary emergency accommodation is triggered.

In *City of Cape Town v Commando and Others*[5], the Supreme Court of Appeal reaffirmed at para 72 that the municipality bears a duty to provide occupiers with suitable temporary emergency accommodation. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*[6], it was held that where the eviction of occupiers is linked to the provision of emergency accommodation by the Municipality, the eviction of the occupiers is just and equitable.

[20] Equally, our Courts have asserted that the state's housing obligations do not rest on its citizens.

In *City of Johannesburg v Changing Tides 74 (Pty) Ltd*[7], it was stated the obligation rests solely on the state and not on private citizens. In *Baron and Others v Claytie Pty Ltd and Another*[8] at para 37, it was said that to the extent that a private owner must assist the state in its responsibility to provide suitable

alternative accommodation, the circumstances must be really exceptional.

[21] There are in my view no exceptional circumstances in this case which warrant the Appellants to continue to shoulder the state's responsibility to provide housing. They have done so for the past four years albeit the Respondents' refusal to work for them and notwithstanding that their accommodation is required for their own workers who are living off site. The Respondents have lived rent free for four years at the Appellant's expense and there is no indication that the Respondents who are employed, have attempted to find alternative accommodation themselves. The state's responsibility to provide emergency housing should the respondents be rendered homeless, is clearly triggered.

[22] In lieu of all of the above, I am satisfied that the requirements as set out at section 9 read with section 8(1) of ESTA have been met and that the Respondents' eviction is warranted. Their eviction will be rendered just and equitable if it is linked to the provision of emergency accommodation by the Municipality. The order that I intend making is of that ilk and will give the Municipality reasonable time to arrange emergency accommodation should it be needed. As in *Blue Moonlight supra*[9] the date of eviction will be linked to a date on which the Municipality has to provide emergency housing should such be needed.

Such date will precede the date of eviction so that the Respondents are assured of accommodation and can make suitable arrangements for their relocation.

[23] The following order is granted:

1. The Respondents shall vacate the premises they occupy on the farm Konstabel Laingsburg Western Cape (“the farm”) by no later than 30 July 2024. In the event of the Respondents failing to vacate by 30 July 2024, the Sheriff for the area is authorised to secure their eviction 31 July 2024.
2. The Laingsburg Municipality must provide the Respondents with emergency accommodation on or before 15 July 2024 provided they are still on the farm and have not vacated it.

Y S MEER

Acting Judge President

Land Claims Court

I agree.

M T Ncube

Judge

Appearances

For the Appellants: Adv. A Montzinger

Instructed by Terblanche Attorneys, Belville Cape Town

For the First to Third Respondents: L Smit

Parker Attorneys, Cape Town

[1] The farm comprises of Farm No 156, Portion 1 of Farm Annex Kragas158, Portion 2 of Kragas Drift No 159, Remainder of Konsatbel No 154 and Annex Quarrie Kloof No 155, all in Laingsburg, Western Cape.

[2] Sections 3 (4) and 3 (5) of ESTA respectively state: “(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.”

[2] Sections 3 (4) and 3 (5) of ESTA respectively state:

“(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.”
- [3] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46.
- [4] Occupiers of Erven 87 and 88 Berea v Christiaan Frederic De Wet N.O and Another 2017
- (5) SA 346 CC.
- [5] City of Cape Town v Commando and Others 2023
- (4) SA 465 (SCA) (6 February 2023).
- [6] In City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA104 CC.
- [7] City of Johannesburg v Changing Tides 74 (Pty) Ltd [2012] ZASCA.
- [8] In Baron and Others v Claytie Pty Ltd and Another 2017 (10) BCLR1225 (CC).
- [9] Paragraphs 100 and 101

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Prepared on 12 October 2026 · Esheria