

SOUTH AFRICA / JUDGMENT

Lotter N.O and Others v Campbell and Others (LCC19R/2024) [2024] ZALCC 29 (6 September 2024)

[2024] ZALCC 29

COURT

Land Claims Court

BEFORE

S C Mia

CASE / FILE NUMBER

LCC19R/2024

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IN THE LAND COURT OF

SOUTH AFRICA

HELD AT RANDBURG

IN CHAMBERS

CASE NO: LCC19R/2024

Date: 06 September

2024

(1)

REPORTABLE: YES/NO

(2)

OF INTREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

In the matter between:

ROBERT
CILVE LOTTER N.O
FIRST
APPLICANT
CATHERINE
MARY SCOTT N.O
SECOND
APPLICANT
PETER
NORMAN LOTTER N.O
THIRD
APPLICANT
and

COLLIN
CAMPBELL
FIRST
RESPONDENT
LIZAAN
CAMPBELL
SECOND
RESPONDENT
ANDREA
CAMPBELL
THIRD
RESPONDENT
KATHERINE
CAMPBELL
FOURTH
RESPONDENT

JUDGMENT

MIA J:

- [1] This matter comes on automatic review in terms section 19(3) of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”). The Magistrate, George, granted an eviction order having considered the founding affidavit, the Probation Officer’s report and an agreement concluded between the applicants and respondents. T An order was granted as follows:
- 1) As agreed by all parties it is ordered that the Settlement Agreement marked Annexure “A” as attached is made an order of court.

Further

- 2) The Sheriff of the Court together with the assistance of the South African Police, if necessary, is authorised to execute the eviction proceedings against first, second, third and fourth respondents should they fail to vacate the property by 1 November 2024.
- 3) There is no order as to costs.

I have considered the record and point out various concerns which may be of assistance in dealing with evictions of this nature.

- [2] It is necessary to consider the background history of the matter prior to highlighting the aspects that are relevant. The applicants are the Trustees of the PN and MR Lotter Family Trust (the Trust). The Trust owns the farm at Portion 15, of the Farm Hans Moes Kraal, no 202, Division George, Western Cape (the Farm) after. The first and second respondents occupied the property when the farm's caretaker gave consent to the first and third respondents' parents to reside on the farm as a security measure in 2016. Both parents of the respondents are deceased. In 2018, the previous caretaker consented to the first and second respondents occupying the property upon paying a rental of R1500. In addition, the

respondents would provide security against vandalism and theft of assets, including farm equipment, building material, livestock and prepared wood and would keep the farmhouse in a habitable state and in good repair.

- [3] Upon the caretaker's death, his daughter took over the limited farming activity, which included the sale of firewood and conducting a piggery and keeping a few head of cattle. She deposed to the affidavit in support of the application for eviction and averred that she had the express consent of the Trust to take over the farming activity. No documents were attached indicating an agreement with the Trust in this regard. I mention this as it relates to the respondents' challenge to her authority to collect rentals and to engage with them about the farm after the demise of her father the previous caretaker. Whilst there is no document reflecting an agreement between the applicants and Ms Oosthuizen, the deponent, relating to her caretaking of the farm or to her conducting farming activities on the farm, there is a resolution attached to the application dated 27 September 2023 authorising Ms Oosthuizen to take the necessary action to evict the respondents.
- [4] The applicants indicated through their attorney in correspondence dated 30 May 2023 that the first and second respondents' occupation was based on a rental agreement, and it was envisaged that the first and second respondents' presence would provide security. The correspondence continues that the respondents no longer provide security or pay rental, and their right to reside on the property is terminated. In the affidavit supporting the application, Ms Oosthuizen stated that she informed the respondents that they no longer had consent to reside on the property and that the third and fourth respondents never had consent.
- [5] The alleged breaches referred to in the affidavit by Ms Oosthuizen are that the respondents failed to pay rentals timeously or at all to the applicants or the caretaker; failed to provide security to the farm and its materials and livestock; or the prepared wood located on the farm. Moreover, it is averred that the respondents themselves participated and allowed others to participate in the theft of materials, prepared wood and livestock, necessitating Ms Oosthuizen to lay criminal charges against the respondents. The further breach committed by the first and second respondents is that they permitted the third and fourth respondents and their children to occupy the farm in November 2022. It is averred that they, as occupiers who were charged a rental of R1500, allowed the farmhouse to fall into disrepair.
- [6] The Probation Officer filed a report recommending that:
- “9.1 Eviction not be granted against the respondent and the family is not granted until they are provided with Legal Counsel. This measure is necessary to ensure the Respondents have the opportunity to evaluate the legality of any criminal charges against them and to determine if there has been a material breach of the agreement under consideration.*

9.2 Furthermore, Legal Counsel should be appointed to conduct a investigation into the purported sabotage and eviction tactics attributed to the authorized person in charge. This investigation is essential to ascertain the veracity of these claims and to ensure fair proceedings.

9.3 The parties, including the George Local Municipality and the Department of Agriculture, Land Reform and Rural Development, engage meaningfully to find suitable alternative accommodation for the first to fourth respondents.

9.4 The Department of Agriculture, Land Reform and Rural Development to activate the provisions outlined in Section 4 of Act 62 of 1997 to secure the tenure of the Respondents, by firstly requesting an offer to sell from the Applicant.

9.5 The George Municipality investigates the availability of vacant land for purposes of securing the tenure of the Respondents, and

9.6 All options in securing the tenure of the Respondents are investigated and applied[1].”

[7] Pursuant to the above recommendations, the Court subpoenaed a legal representative from Legal Aid South Africa. Legal Aid South Africa legally represented the respondents from 20 May 2024. The matter was allocated to the Land Rights Management Unit. According to the correspondence on file, the legal representative representing the respondents could not attend court on 21 May 2024 and sent a settlement proposal to the applicants and requested that the matter be postponed in her absence. The record reflects that the respondents’ attorney made a settlement proposal, and the matter was postponed for the settlement agreement. This settlement agreement was made an order of court.

[8] The Court a quo handed down judgment and dealt with the issues it considered applicable which included:

7.1 whether the respondents were occupiers?

7.2 whether there was compliance with section 9(2)

7.3 whether the respondents’ right of residence had been validly terminated in terms of section 8 of ESTA?

7.4 whether or not it was just and equitable to grant an order for eviction?

[9] At the outset, it is necessary to highlight section 25 of ESTA which provides:

“(1) The waiver of 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 the Court.

(2) The court must have regard to, but not be bound by any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act.

- (3) Notwithstanding the provisions of subsections (1) and (2), if an occupier vacates the land concerned freely and willingly, while being aware of his rights in terms of this Act, he or she shall not be entitled to institute proceedings for restoration in terms of section 14.

WERE THE RESPONDENTS OCCUPIERS?

- [10] The Magistrate was satisfied that the first and second respondents were occupiers, having concluded a rental agreement with the deceased caretaker of the farm. The third and fourth respondents were belatedly granted permission to reside on the farm by Ms Oosthuizen, who put herself forward as the person in charge of the farm. The Presiding Officer relied on the lease agreement and the definition of an occupier[2]. The written lease agreement did not form part of the record but is referred to as Annexure 1 in the probations Officers report. This did not form part of the record sent on review.

WAS THERE COMPLIANCE WITH SECTION 9(2) OF ESTA

- [11] The provisions of section 9(2) are peremptory prior to the granting of an eviction order. The termination of the right of residence was ostensibly as a result of a breach. The Presiding officer relied on the reasons set out in Ms Oosthuizen's affidavit for determining a breach namely non-payment of rental, theft and the poor state of the property.
- [12] A conclusion that the respondents breached the agreement does not follow where the lease agreement was written and the agreement made provision for payment into the deceased caretaker's bank account. The Probation Officer's report indicated that the respondents were unsure that Ms Oosthuizen was the person in charge and they were not sure she was authorised to receive rental payments.
- [13] The founding affidavit does not indicate earlier than the resolution dated 23 September 2023 that she was appointed in this position upon the demise of her father, the previous caretaker and person in charge. The respondents only found out that Ms Oosthuizen was a person in charge when this became known through the resolution of the Trustees of the PN and MR Lotter Family Trust, authorising Ms Oosthuizen to commence legal proceedings, attached to the founding affidavit. The resolution is dated 23 September 2023. This was specifically for the eviction proceedings. There was no prior resolution passed by the Trustees, which is attached to the founding affidavit, that Ms Oosthuizen was the person in charge and authorised to collect rentals from the respondents.
- [14] There appears to be a variance in the parties' versions on whether the tenancy agreement was verbal or reduced to writing. The Annexure 1 agreement referred to by the Probation Officer did not form part of the record and it does not appear that attention was given to this document. Annexure 1 is referred to in the Probation Officers report dated 22 March 2024[3]. The first and second respondents, requested Ms Oosthuizen to provide proof that she was the caretaker and authorised to receive payment of the rental as the agreement made provision for the rental to be paid into the bank account of the deceased caretaker. In the absence of proof that she was appointed as the caretaker and authorised to receive the

rental payments, they ceased making payments.[4] It was only upon receipt of the Notice of Motion that they came to know about Ms Oosthuizen as the person in charge through the resolution attached to the notice of motion. Upon that confirmation, they were willing to continue making rental payments.

- [15] In view of the above, the respondents did not appear unwilling to pay but feared they were paying the wrong person. It is inexplicable how the Court arrived at the conclusion that the termination of residence was valid when the failure to pay was not wilful. The occupier was not afforded an opportunity to remedy the breach and they were willing to do so. To the extent there was a breach in terms of section 6(3)[5] of ESTA there was no written notice affording thirty days to remedy such breach and no indication what the nature of the breach was and the steps required to remedy the breach.
- [16] The reasons advanced by Ms Oosthuizen, in the founding affidavit, were that the respondents conduct totally disregarded the property and other rights of her and family members. It is not clear in what respect this had occurred where Ms Oosthuizen is not the owner of the property. There is no explanation indicating how any other property rights pertaining to Ms Oosthuizen or her family were disrespected and whether there was written notice given to remedy the conduct. This written notice was not attached to the notice of motion if there was any. There is reliance placed on the confirmatory affidavit of Mr Franco Juan Schoeman. The affidavit confirms the content of the founding affidavit and gives no content or an explanation of any breach or disregard of rights of property.
- [17] The Court considered that provisions of section 9(2)[6] are peremptory prior to the granting of an eviction order and referred to the case law it deemed applicable. The Court reminded itself to be holistic and sensitive in its approach referring to the decision of *Wilson Singo v Carradale Estates CC*[7] where the court said:

“In each case, an eviction application in terms of the Act, the court may not take a legalistic and formalistic short cuts but must determine whether or not an eviction order was just and equitable in all the circumstances. This can only be done by a thorough holistic, and sensitive approach to all evidence.
“

The record reflects that notice was given to all the respondents, including the Municipality and the Department of Land Affairs. Even if the right of residence was terminated, in view of the concerns raised it is not evident from the judgment that the court considered section 9(2)(c) of ESTA which refers to the consideration of sections 10[8] and 11 of ESTA prior to granting an order for eviction.

TERMINATION OF THE RIGHT OF RESIDENCE

- [18] The concerns about the rental agreement making provision for the payment into the caretakers bank account is highlighted above as is the termination of the right of residence where the respondents are not afforded an opportunity to remedy to back payment upon

being properly informed about the person in charge. There is no basis to a finding that the respondents wilfully failed to pay the rental. There was no communication from the Trustees that it was resolved that Ms Oosthuizen was placed in charge of the farm and was allocated to collect rentals from the respondents. In the circumstances I am not at all convinced that the respondents were wilfully in breach of the agreement for failing to pay the rental. The respondents were not furnished with an alternative bank account to pay the rental. There is no indication that the factors indicated in section 8[9] of ESTA have been considered, namely the fairness of the agreement, the interests of the parties and the comparative hardships of the parties, the existence of a reasonable expectation of renewal, and the fairness of the opportunity to make representations.

WHETHER IT IS JUST AND EQUITABLE TO GRANT AN EVICTION ORDER?

[19] In determining whether it was just and equitable to grant the eviction, the Court had regard to the alleged breaches and that the property was not habitable apart from the failure to pay rent. There is no indication it had regard to the factors raised by the Probation Officer with regard to the availability of alternative accommodation and the impact the eviction would have on the family and the children. Notwithstanding that a settlement agreement was reached, the Court did not ascertain whether these aspects were satisfactorily addressed. There is no indication that the Municipality was engaged or the Department of Land Affairs. Section 12(2) of ESTA enables a Court to determine a just and equitable date having regard to relevant factors including the fairness of an agreement between the parties. From the record it is evident that the applicant is eager to ensure the sale of the property for residential development. To this end the applicants intend to consolidate the property and require the occupier to be removed as soon as possible.

[20] The consideration by the Court that the parties have no crops ignores that they rented the property for accommodation rather farming purposes. The reason the property was in a state of disrepair was due to a lack of maintenance. Ms Oosthuizen indicated that the infrastructure was old. The bucket system was related to the lack of maintenance and the old infrastructure. Whilst the respondents were not formally employed on the farm, it appeared that their contribution on the property and a part of the agreement was that their presence served as a deterrence to criminal activity and security. It appears that the respondents were expected to repair the property and pay rent for occupation. There appeared to be no balancing of the interests of the applicants and respondent's

circumstances when having regard to the settlement agreement.

[21] In considering whether it is just and equitable to grant an eviction the Court must take into account the availability of suitable alternative accommodation. The eviction according to the Probation Officer will negatively affect the respondents. They are not on a waiting list of the Municipality and have been unsuccessful in securing rental accommodation as it exceeded their means. The requirement of rental deposits posed a further difficulty. They rely on child support grants and the first respondent's income. The third and fourth

respondents' children will be subjected to a second eviction, which will be disruptive and have a negative emotional impact. The children receive food assistance at the school they currently attend.

- [22] To the extent that parties reach an agreement, such agreement is between the parties and need not bind a court to grant a particular order. Where a court is satisfied it is just and equitable to grant relief it should consider the factors independently and whether an order as prayed is appropriate. Section 12 (2) provides:

“(2) In determining a just and equitable date the court shall have regard to all relevant factors, including—

- (a) the fairness of the terms of any agreement between the parties;
- (b) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land; and
- (c) the period that the occupier has resided on the land in question “

- [23] I have considered the record of the proceedings before the Magistrates Court George. I have noted concerns I have above. There is a settlement reached and for the reasons above and having regard to the factors in section 12(2) the order below is applicable. The date does not take into account that the children are required to vacate in the middle of a school year, which will be disruptive and emotionally detrimental, as indicated by the Probation Officer. Commercial interests cannot surpass the wellbeing and the dignity the occupiers and their children are afforded by allowing sufficient time to transition to alternative accommodation.

ORDER

- [24] Having considered the proceedings before the Magistrates Court, George in case number, 3008/2023, on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act 62 of 1997.

1. The order made by the Magistrate C Daniels on 29 July 2024 is confirmed with the following amendments.
2. Paragraph 2.2. of the settlement agreement made an order of court on 29 July 2024 is amended to read as follows:

2.2 The respondents will continue to occupy the property until:

2.2.1 They have to vacate the property on 31 January 2025.

3. The Sheriff of the Court, together with the assistance of the South African Police Service, if necessary, is authorised to execute the eviction proceedings against the first, second, third and fourth respondents should they fail to vacate the property by 7 February 2025.

S C MIA

ACTING JUDGE OF THE LAND COURT

- [1] The italicised portions referred to updated sections of the report.
- [2] Occupier defined as “ a person residing on land which belongs to another person, and who on 4 February 1997 or thereafter, had consent or another right in law to do so”
- [3] Record page 57
- [4] Record page 57
- [5] 6(3) An occupier may not— (a) intentionally and unlawfully harm any other person occupying the land; (b) intentionally and unlawfully cause material damage to the property of the owner or person in charge; (c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or (d) enable or assist unauthorised persons to establish new dwellings on the land in question.
- [5] 6(3) An occupier may not—
- (a) intentionally and unlawfully harm any other person occupying the land;
- (b) intentionally and unlawfully cause material damage to the property of the owner or person in charge;
- (c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or
- (d) enable or assist unauthorised persons to establish new dwellings on the land in question.
- [6] 9(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.
- [6] 9(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.

[7] Wilson Singo and Others v Carradale Estates CC (LCC63R/04, LCC50/04)

[2007] ZALCC 1 (31 January 2007)

[8]

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;

[8]

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;
- [9] 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 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.
- [9] 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 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.

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