
SOUTH AFRICA / JUDGMENT

Moyeni v De Vries and Others NNO (808/2019) [2020] ZASCA 128 (13 October 2020) [2020] ZASCA 128

COURT

Supreme Court of Appeal

BEFORE

NAVSA, MOCUMIE, MAKGOKA, EKSTEEN, GOOSEN

CASE / FILE NUMBER

808/2019

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 808/2019

In the matter between:

KATIE MOYENI APPELLANT

and

JOHANNES PETRUS DE VRIES NO FIRST

RESPONDENT

RUDI DAWID STRYDOM NO SECOND

RESPONDENT

MARIE CHRISTINE ELIZABETH

MEYERS NO THIRD

RESPONDENT

JOHAN WILLEM MEYER NO FOURTH

RESPONDENT

TANYA DE VRIES NO FIFTH RESPONDENT

(In their capacities as trustees of the De Vries Family Trust-IT 1439/2015C)

Neutral citation: Moyeni v De Vries and Others NNO (Case no 808/19) [2020] ZASCA 128 (13 October 2020)

Coram: NAVSA, MOCUMIE and MAKGOKA JJA and EKSTEEN and GOOSEN AJJA

Heard: 15 September 2020.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand-down is deemed to be at 10h00 on 13 October 2020.

Summary: Land – eviction under Extension of Security of Tenure Act 62 of 1997 (ESTA) – whether appellant was a protected occupier as envisaged in s 8(4) of ESTA – purpose is to protect people such as the appellant who are vulnerable and to provide security of tenure.

ORDER

On appeal from the Land Claims Court (hearing an automatic review in terms of s 19(3) of Extension of Security of Tenure Act 62 of 1997 from Worcester Magistrates' court.):

Order

1 The appeal is upheld with costs.

2 The order of the Land Claims Court confirming the eviction of the appellant and others is set aside in its entirety and substituted as follows:

'The Magistrate's court eviction order of 17 November 2017 is set aside and substituted as follows:

'The application for eviction is dismissed with costs.'

3 The costs for the application for condonation in relation to the non-compliance with the rules of this Court to be borne by the attorneys for the appellant.

MOCUMIE JA (NAVSA and MAKGOKA JJA and EKSTEEN and GOOSEN AJJA concurring)

[1] This is an appeal against the judgment and order of the Land Claims Court (LCC) (Potterill J, sitting as the reviewing court) granted on 7 February 2018. The matter was before LCC in terms of the automatic review procedure, provided for in s 19(3) of the Extension of Security of Tenure Act 62 of 1997 (ESTA), after an eviction order was granted by the Worcester Magistrates' Court (Magistrates' Court) on 17 November 2017. The LCC confirmed the eviction order in terms of s 19(3)(a) of ESTA.[1]

[2] Mrs Katie Moyeni, the appellant, is a 73-year-old pensioner who resides on Mooihoek Farm (the farm), Worcester, Breede Valley in the Western Cape. The De Vries Family Trust (the Trust), of which the respondents are trustees, has been the owner of the farm since 2015.[2] Mr Brown Moyeni, the appellant's late husband, had been employed there by the Trust as an assistant manager since 2015. Before the Trust acquired the farm, Mr Moyeni had been

employed there by the first respondent, Mr Johannes De Vries. He had worked for the first respondent since 1994.

- [3] The appellant and her children came to live on the farm with Mr Moyeni, in 1997. For as long as Mr Moyeni's employment

relationship endured the appellant not only resided with him and their family on the farm, she also worked as a seasonal worker for the first respondent and then the Trust. This, as will be shown later, was superficially disputed by the respondents. Mr Moyeni

passed away during March 2014. After he passed away the appellant and her family continued to reside on the farm in the house allocated to them.

- [4] On 19 September 2014, barely six months after Mr Moyeni, passed away, the appellant was served with a letter from the attorneys of the Trust. The letter informed her as follows: (loosely translated from Afrikaans):

'We have received instructions from our clients to cancel your right of residence and to request you to vacate the house that you are currently occupying, and also to leave the farm Mooihoek, on or before 30 September 2015, in terms of section 8 of the Extension of Security of Tenure Act [62 of 1997.]

The consequence is that, in terms of section 8(5) of the Extension of Security of Tenure Act, you are now given twelve (12) months' notice to vacate the house you were provided with, which period shall come to an end on 30 November 2014. Should you fail to comply with this notice, we shall take the necessary steps to have you evicted.'

The appellant did not vacate the house as instructed. The Trust thereafter approached the Magistrate's Court with an application for the eviction of the appellant from the house. The matter was heard on 9 May 2016.

- [5] The Trust alleged that Mr Moyeni had been an employee of the Trust and that the appellant occupied the house through him, as her spouse. After his death, so it was alleged, the appellant had no right to remain on the farm. The Trust alleged that the appellant had never worked for it, except on one occasion – for one week, in one season – as a temporary seasonal worker.
- [6] The Trust also alleged that the appellant had breached the housing rules of the farm by keeping a dog without permission, having lodgers in the farmhouse, using vulgar language and abusing alcohol. As a result, the appellant was issued with a written warning on 4 November 2014, and on 9 March 2015 she was served with a disciplinary notice which set out her alleged transgression namely, that she kept lodgers in the farmhouse contrary to the housing rules.
- [7] The Trust stated that it needed the farmhouse to provide accommodation for its other employees. It had given the appellant the

option of using a smaller house on the farm and also offered her assistance to relocate, which she refused. It alleged that there were neighbouring farms where she could find work and could be accommodated.

- [8] In her answering affidavit the appellant was emphatic that she had the right to continued occupation of her home. She asserted that she had the consent of the previous and present owners, and had been employed by the both the previous owner and the Trust.
- [9] Notwithstanding the appellant's emphatic assertion that she had been employed on the farm over an extended period the Magistrate found that there had never an employment agreement between the appellant and the respondents. The Magistrate held that the appellant's right to occupation was derived solely from her late husband as employee of the Trust in terms of s 6(2)(d) of the ESTA; and that upon the passing away of Mr Moyeni, her right to remain had been lawfully terminate in terms of s 8(5) of ESTA[3]

[10] The Magistrate consequently, made the following order:

- ‘(a) The first respondent and all other persons having occupation through her are ordered to vacate the house situated on Mooihoek Farm, De Wet, in the district of Worcester before or on the 31st of December 2017.
- (b) Should the [first] respondent and all other persons having occupation through her not vacate the property voluntarily by that date, the Sherriff for the district of Worcester may execute this order on 2 January 2018 or a soon thereafter as possible.
- (c) The court makes no order as to costs.
- (d) This order is suspended pending the confirmation thereof by the Land Claims Court on review.’

[11] The main issue in this appeal is whether the appellant is a protected occupier in terms of s 8(4) of ESTA.

[12] At the commencement of proceedings before us we were called upon to consider the appellant's failure to note the appeal within the prescribed period. The appellant only applied for condonation for the late filing of the heads of argument. This was vigorously opposed by the Trust. It was submitted, on behalf of the Trust, that there was not only the late noting of the appeal but also the late filing of the appeal record. This Court enquired of the Trust whether it insisted on depriving a pensioner of humble means of an opportunity to be heard on whether she should have been evicted as a result of missteps by her attorneys. After taking instructions, counsel for the Trust indicated that the Trust was willing to accept that the matter be heard on the merits, but submitted that the Court should show its displeasure by making the attorneys pay the costs. We were informed from the Bar, by counsel on behalf of the appellant, that the Department was funding the appeal. We granted the condonation and reserved the question of costs. An issue I will deal with in due course.

[13] The Magistrate erred in finding that there was never an employment agreement between the appellant and the Trust, as well as with the first respondent. The Trust was bound by what the appellant's answering affidavit said about her employment relationship with the past and present employers. Moreover, in the replying affidavit, there was an admission on behalf of the Trust, albeit with qualification, that the appellant had been employed on the farm. Significantly, the Trust admitted that the appellant was a protected occupier in terms of s 8(4), but it insisted that she had committed breaches in terms of s 10(1)(c).

[14] At this stage it is necessary to have regard to s 8(4), which deals with a particular category of protected occupiers. Section 8(4) provides:

‘(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. (Emphasis added.)

[15] Section 10(1) reads as follows:

‘(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 s 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 duty 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 months' 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 manner which could reasonably restore the relationship...’

[16] Section 6(3) provides that an occupier may not =

‘(a) intentionally and unlawfully harm any other person occupying the land;

- (b) intentionally or 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.’

[17] In terms of s 1 (xii) of ESTA ‘occupier’ means a person residing on land which belongs to another person. and who has or on 4 February 1997 or thereafter had consent or another right in law to do so...’. What should not be lost sight of is that ESTA was intended to provide protection for vulnerable people like the appellant. The Constitutional Court stated in *Klaase and Another v Van Der Merwe NO and Others*,^[4] citing its earlier judgment in *Goedgelegen*,^[5] ‘ESTA is “remedial legislation umbilically linked to the Constitution”. It seeks to protect people, like Mrs Klaase, whose tenure of land is insecure. In my view, the appellant falls squarely within this category of people – particularly in the light of her being a woman.

[18] Recently, the following was said in *Daniels v Scribante*:^[6]

‘Painfully, in some instances this is not just history. To this day, some of the poorest in our society continue to keep homes under the protection of ESTA. Needless to say, occupiers under ESTA are a vulnerable group susceptible to untold mistreatment. This is especially so in the case of women.’

[19] As stated earlier, the appellant was emphatic in her assertion that she was a protected occupier in terms of s 8(4) of ESTA, on the basis that she had been employed on the farm during the relevant period and was thus an occupier in her own right, rather than through her husband. The Magistrate was thus bound by her version of events. This is especially so, in the light of the respondents’ admission in their replying affidavit that she was a protected occupier. *Plascon Evans* [7] will remain authority for what is stated in the first sentence. In holding as aforesaid the Magistrate erred. In relation to the respondents’ reliance on breaches in terms of s 10 of ESTA, it must be noted that the appellant strenuously denied that she had committed any breaches of ESTA and insisted that she was a model occupier. Her allegations in this regard cannot be rejected merely on the papers filed of record. The respondents did not provide any compelling and uncontroverted

evidence that might have entitled them to rely on the provisions of s 10 read with s 6(3) of ESTA. There was therefore no basis on which the order the Magistrate granted could be justified or for the confirmation thereof by the LCC. The appeal ought to succeed.

[20] Lastly, the issue of costs. There were several repeated missteps as alluded to earlier in this judgment. There was repeated flagrant disregard of the rules of this Court by the attorneys for the appellant. The explanation was far from satisfactory. All counsel for the appellant could proffer was an acknowledgement that more could have been done. Of course, one would have hoped that, by this time, the many admonitions concerning what is required of an application for condonation would by now be known by practitioners who are entrusted with the preparation of appeals to this Court. This case has proven otherwise. To make it clear that this conduct will not be countenanced, this Court is duty bound to show its

displeasure by mulcting the attorneys responsible for the flagrant disregard of this Court's rules with an appropriate order as to costs in relation to the application for condonation; even though the appellant is successful in her appeal.

[21] For all of these reasons, the following order is made:

BC MOCUMIE

JUDGE OF APPEAL

APPEARANCES

For Appellant: C Tsegarie

Instructed by: Brink & Thomas Inc. C/O Webbers Attorneys

For Respondents: A Van Loggerenberg

Instructed by: Wilna Roux Attorneys C/O Symington & De Kok Attorneys

[1] Section 19(3) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) provides, inter alia: 'Any order for eviction by a magistrate's court in terms of this Act, ... shall be subject to automatic review by the Land Claims Court which may- (a) confirm such order in whole or in part...'

[2] See the Title Deed marked 'DVF 3' at page 23 of the record.

[3] Section 8(5) reads as follows; 'On the death of an occupier contemplated in subsection (4) the right of residence of an occupier who was his or her spouse or dependent may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependent has committed a breach contemplated in section 10F.' Section 8(4) is dealt with later in this judgment.

[4] *Klaase and Another v Van Der Merwe NO and Others*

[2016] ZACC 17; 2016 (6) SA 131 (CC) para 51.

[5] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*

[2007] ZACC 12; 2007 (6) SA 199 (CC) (Goedgelegen) para 53.

[6] *Daniels v Scribante*

[2017] ZACC 13; 2017 (4) SA 341 (CC) para 22, with reference to *Klaase* (above fn 12).

[7] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 654E-I.

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