

SOUTH AFRICA / JUDGMENT

Rheeder and Another v Engelbrecht and Another (LCC09R2024) [2024] ZALCC 28 (5 September 2024)

[2024] ZALCC 28

COURT

Land Claims Court

BEFORE

Flatela

CASE / FILE NUMBER

LCC09R2024

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IN

THE LAND COURT OF SOUTH AFRICA

HELD

AT RANDBURG

CASE

NO: LCC 09R2024

MAGISTRATE

COURT CASE NO:22/2022

Before

the Honourable Flatela J

In

Chambers

05

September 2024

(1)

REPORTABLE: YES/NO

(2)

OF INTREST TO OTHER JUDGES: YES/NO

(3)

REVISED

In

the matter between:

STEPHANUS
RHEEDER
First
Applicant
MILINDA
ANNETT RHEEDER
Second
Applicant
and
ARTHUR
S ENGELBRECHT
First
Respondent
RUAN
ENGELBRECHT
Second
Respondent
ORDER
1. The order of the
Magistrate is set aside in its entirety.

JUDGMENT

FLATELA J

Introduction

- [1] This is an automatic review emanating from the Magistrate Court, Calitzdorp, Western Cape, in terms of section 19(3) of the Extension of Security of Tenure Act 62 of 1997 [1].
- [2] The Applicants instituted eviction proceedings against the First and Second Respondents from the farmhouse on Badshoogte Farm, Warmwater, Calitzdorp District, Western Cape (the Farm) on the basis that the consent granted to reside in the property had been terminated by effluxion of time. It is common cause that the Respondents derived their right of residence on the farm from the oral lease agreement entered into between the First Applicant and the First Respondent in November 2020.
- [3] In the Court a quo, the Applicants contended that they were entitled to the eviction order against the Respondents because the Respondent's right of

residence had been terminated in accordance with the provisions of section 8 of ESTA.[2] , The Respondents had not vacated within the two months given and that the provisions of section 11 of ESTA had been complied with.

[4] The Respondents disputed that the termination of their right to residence was just and equitable in terms of section 8(1)[3] read with section 9 (2)(a)[4] and section 11'; therefore, the eviction order would not be just and equitable. The Respondents averred further that in the event the Court found that the eviction would be just and equitable, the Court should make an order compelling the Municipality to provide emergency housing materials and a location to erect them to avoid homelessness.

[5] In *Aquarius Platinum (SA) (Pty) Ltd v Bonene and Others* [5], the Supreme Court of Appeal held that its settled law that in the determination of the Application in terms of section 8 of ESTA, the Court must engage in a consecutive two-stage inquiry as follows:

'... (the need to protect the rights of residence of vulnerable persons) indicate a two-stage procedure. Section 8 provides for the termination of the right of residence of an occupier, which must be on lawful ground and just and equitable,

taking into account, inter alia, the fairness of the procedure followed before the decision was made to terminate the right of

residence. Section 8 at least requires that a decision to terminate the right of residence must be communicated to the occupier. Section 9(2) then provides for the power to order eviction if, inter alia, the occupier's right of residence has been terminated in

terms of s 8, the occupier nevertheless did not vacate the land and the owner or person in charge has, after the termination of the right of

residence, given two months' written notice of the intention to obtain an eviction order. Section 8(2) must of course be read with s 8(1) and provides for a specific instance of what may constitute a just and equitable ground for the termination of a right of residence.'

The Parties

[6] The First Applicant is Stephanus Rheeder, an adult male farmer and the registered owner of the Farm. He co-owns the farm with his wife, Milinda Annett Rheeder (the Second Applicant). The First Applicant is in charge of the farm's daily activities.

[7] The First Respondent is Arthur S Engelbrecht, an adult male occupier of 63 years of age who is currently residing in one of the houses on the farm with his adult son Ruan Engelbrecht (the Second Respondent).

[8] The First Applicant and the First Respondent are not strangers; they have known each other since the 1980s. They worked together at some point, and after losing contact for some time, they reconnected again.

Background

Facts

- [9] In 2020, the First Respondent requested that the First Applicant temporarily accommodate him and his son on the farm. The First Applicant granted the Respondents temporary accommodation, and the Respondents occupied one of the houses on the farm.
- [10] The Respondents have been residing on the Farm since 2020. Initially, there was no agreement regarding rental payment. However, in November 2020, an oral rental agreement of R1500 (One Thousand Five Hundred) per month was entered into between the First Applicant and the First Respondent. The First Applicant paid R18 000 (Eighteen thousand Rand), which is a rental for 12 months. The Respondents stopped paying rent in February 2022.

Termination of Right to Residence and Eviction

- [11] On 07 June 2022, the First Applicant notified the Respondents of the cancellation of their right of residence and afforded them two months to vacate the farm. The Respondents failed to vacate the farm.
- [12] The Applicants instituted these eviction proceedings against the Respondents in the Magistrate's Court, Calitzdorp, on 04 November 2022.
- [13] The grounds for the eviction may be summarised as follows:
- In 2000, the First Respondent requested temporary accommodation from the Applicants as he intended to relocate to Gauteng. The First Applicant agreed to accommodate the Respondents on the property, but the First Respondent was to live in his caravan; but, when the Respondents arrived in April 2020, they occupied one of the houses on the property instead of a caravan;
 - Initially, there was no agreement for rental. However, in November 2020, the First Applicant and the First Respondent entered into an oral lease agreement for R1500 for 12 months. The First Respondent paid an amount of R18 000 in advance. The agreement was that they were to vacate after 12 months.
 - The First Respondent defaulted on the rental payment from February 2022;
 - The Respondents abused alcohol and drugs and caused damage to the property; some windows were broken, and the Respondents caused further damage when they started a fire in the house. The Respondents were abusive, and they threatened the Applicants with violence.

- e. A notice of cancellation and notice to vacate was served upon the Respondents on 7 June 2022. After the Respondents were served with the notices, they caused further damage to the property by damaging water pipes and solar panels on the roof of the house they were occupying. The Second Respondent also shot one of the sheep with a BB gun.
 - f. The Respondents are in unlawful occupation and have no legal right to occupy the property. Despite demand, they refuse to vacate. None of the Respondents are 60 years or older. They are in good health, and no one has disabilities.
 - g. Respondents have failed to vacate the house and are in unlawful occupation.
- [14] The Applicants contended that they were entitled to an eviction order in that
- a. The Respondent's right of Residence has been terminated in terms of section 8';
 - b. The Respondents have not vacated the property within the two months given
 - c. The conditions for an order in terms of Section 11 were complied with.
 - d. A notice of application would be served to the relevant municipality and the provincial office of the Department of Rural Development and Land Affairs.
- [15] The notice of application for eviction was served upon the Department on 22 November 2022 and upon the Municipality on 12 December 2022.
- [16] On 20 February 2023, the office of the Acting Municipal Manager addressed a letter to the Applicants' legal representatives

wherein they advised that "... we do not have any form of accommodation to avail to the respondents and would therefore not be able to assist the Respondents with temporary or emergency housing".

The Respondents' submissions

- [17] The Respondents opposed the application. The First Respondent filed an opposing affidavit on behalf of the Respondents, and he testified as follows:
- a. The First Respondent requested that the First Applicant provide him and his son with temporary accommodation on his farm because he did not want to relocate to Gauteng. The First Applicant agreed to temporarily accommodate him in one of the houses on the farm.
 - b. The First Respondent disputed that they were to live in the caravan; he stated that he does not own a caravan but has a camping trailer. The First Respondent contended that he arrived in April 2020 with a 5 or 8-ton truck with his belongings.
 - c. The First Respondent concedes that the parties entered into no rental agreement. However, he agreed to assist the First Applicant with his sheep on the farm, and the Second Respondent assisted the Applicants in ploughing without pay.

- d. The First Respondent averred that when he arrived, the house was run down, there was much scrap, and the First Applicant's furniture needed to be taken to the storeroom. The house had to be cleaned first. The Respondent slept in the camping trailer while fixing the house.
- e. The house had no electricity and no water. The First Respondent enquired to Eskom about the costs of an electricity connection. He was advised that it would cost approximately R25,000 (twenty-five thousand). The First Respondent installed a Solar Panel system for power and paid for a water connection. The First Respondent averred that the First Applicant assisted them in installing solar panels.
- f. In November 2020, the First Applicant asked for a rental of R1500 per month, and the First Respondent paid an amount of R18 000, which was equivalent to a year's rental in advance. The First Respondent averred that he paid a rental in advance because he could afford to do so, and he wanted to assist the First Applicant, who was experiencing financial difficulties at the time. The Respondents dispute that the lease agreement was for a year. He averred that there was no fixed /determinable date for the lease agreement. He states that whenever they had disagreements, he would tell them to vacate the property and then allow them to continue residing in the house.
- g. The First Respondent averred that he stopped receiving contractual work in 2021, and he received a provident fund payout of R172 297.80 in January 2021. The First Respondent used the payout and paid for solar panels, and he installed an inverter for the house at the cost of R45 000 and installed a sun-geyser; he also paid his debt and a car. The First Respondent averred that the First Applicant saw the SMS about the provident cash payment, and he started demanding rental.
- h. The Respondents disputed that they vandalised the house after receiving the notice of cancellation and eviction. He states that when they arrived, the windows were cracked, some were broken, and more windows broke when the ladder fell on the window, but he states that he fixed all windows. The Respondents also disputed that they were the ones who started the fire in the house; they had gas in the house. He contends that it is vagrants who torched the carpet in the house, and he tiled the floor after that incident.
- i. The First Respondent averred that he paid for the water connection to the house, purchased the solar panels and installed the inverter with his provident fund money;
- j. The BB gun is not working and has not been working for years.

[18] The Respondents conceded the following facts:

- i. The Respondents are occupying the property without the Applicants' permission;
- ii. The Respondents have no further legal right to occupy the property;

iii. Despite the demand and notice to vacate the property on or before 1 September 2022, they have not vacated the property;

iv. The Respondents' actions led to such a fundamental breach of their relationship with the Applicants that it is not practically possible to remedy either at all or in a manner that would reasonably restore the relationship.

[19] The First Respondent averred that the notice of termination of rights, which summarily canceled their oral agreement to reside in the house, was unfair in that they were not given sufficient notice. They expected to continue to occupy the house as the First Applicant, on previous occasions, threatened with eviction, which later allowed them to continue residing in the house.

[20] Regarding his circumstances, the First Respondent averred that he was 63 years old and in poor health. He receives a government grant. The Second Respondent is not working. He averred that the eviction would lead to homelessness. There is no suitable accommodation, and their family members are not in a position to accommodate them in their respective homes. The First Respondent had applied for an army veteran allowance, medical and housing subsidy, and he had not received a response.

[21] The First Respondent averred that he had not applied for an RDP house as he was not sure whether such schemes would include him. He tried to look for alternative accommodation but found it to be out of his budget as he was only receiving a government pension. The First Respondent contended that the eviction would lead to homelessness as the Kannaland Municipality advised the First Applicant's legal representatives in the form of a letter that it did not have any form of accommodation to avail to the Respondents and would therefore not be able to assist the Respondents with temporary or emergency housing.

[22] The First Applicant did not file a replying affidavit.

Meaningful Engagement

[23] In the minutes of the meeting between the Applicants' legal representatives, the Respondents' legal representatives, the officials of the municipality, the officials of the Department of Human Settlement, the officer in the employ of the Department

reflects that the municipality advised that the waiting list for housing is long and full and same is only for qualified applicants.

The minutes record that the Respondents are not on the waiting list. They also do not qualify for a partially financed flip house subsidy. The emergency housing materials can be easily available.

[24] In a discussion regarding whether the Respondents can rent the "volkhuis," they stated that they do not earn enough to afford it.

[25] The Probation Officer recommended that the court order be granted in line with the provisions of sections 11 and 12 of ESTA.

The Magistrate's decision

[26] The Magistrate began his decision by evaluating the evidence. The Respondents had raised a point in limine stating that the Applicant's failure to join the local Municipality and the Department of Agriculture, Land Reform and Rural

Development in these proceedings was fatal to its application. The Magistrate held that both the Department and the Municipality were involved in the proceedings as the Sheriff served them with the application, and they filed the reports. The court correctly dismissed the point in limine.

[27] Counsel for the Respondent argued that the termination of the Respondent's right of residence was not in compliance with the provisions of section 8; therefore, if granted, the eviction would be just and equitable. The Magistrate failed to deal with the allegations of noncompliance with section 8 of ESTA in his judgment. On 13 March 2024, the Magistrate's Court, Calitzdorp, granted an order for the eviction of the Respondents to vacate the property on or before 30 April 2024, failing which the Sheriff is authorized to evict them by 13 May 2024.

Termination of the Right of Residence in terms of section 9(2) (a) of ESTA

[28] For the Applicants to succeed in evicting an occupier before 4 February 1997, they must show that they have complied with the mandatory

requirements of section 9[7]. Section 9(2) requires that the right of residence must have been terminated in terms of Section 8.

[29] It is common cause that the Applicants officially terminated Respondent's right to residence on the Farm on 7 June 2022. The letter of 7 June 2022 from the Applicant's attorneys addressed to the Respondent states as follows:

RE: STEPHANUS RHEEDER // YOURSELF

The aforementioned matter has reference and confirms that we hold instructions on behalf of the registered owner of the above property.

We further confirm that we hold instructions to inform you that our client herewith cancels the verbal agreement in terms of which you occupy the property and to proceed with an application for eviction against you on the basis that you are unlawful occupiers of the property in that you do not have permission from the owner to remain in occupation of the property.

Take notice that unless you vacate the property within 2(two) two months from the date of service of this notice, a formal application for eviction will be made against you, in which case you will also request the court to grant an order of cost against you.

We trust, however, that you will give your full cooperation and that it will not be necessary to go to the extent of a formal Court application.

In the communication relating to your occupation of the property are to be directed to the office and above addressed.

[30] In this notice purportedly given in terms of section 8 read with sections 9(2)(d)(i) and 11, the Applicant seeks to cancel the right of residence in terms of section 8. In the same document, he gives the Respondents a notice to vacate and his intention to obtain an eviction order. The hybrid approach of terminating the right of residence and giving notice of intention to obtain an eviction order in the same notice is not acceptable.

[31] In *Snyders and Others v de Jager and Others* [8] Zondo J, writing for the majority, held as follows regarding the requirement of section 8 of ESTA:

‘Section 8(1) makes it clear that the termination of a right of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirement for the substantive fairness of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable. The requirement for procedural fairness is captured in section 8(1)(e).’[9]

[32] In the following paragraphs, the learned Judge held that:

“If a person has a right of residence on someone else’s land under ESTA, that person may not be evicted from that land before that right has been terminated. In other words, the owner of the land must terminate the person’s right of residence before he or she can seek an order to evict that person. However, it must be borne in mind that the termination of a right of residence is required to be just and equitable in terms of s 8(1) of ESTA.”[10]

[33] Regarding the provisions of section 8(1)(e) of ESTA, the learned judge expressed himself as follows:

“ESTA requires the termination of the right of residence to also comply with the requirement of procedural fairness to enable the person to make representations why his or her right of residence should not be terminated. This is reflected in section 8(1)(e) of ESTA. A failure to afford a person that right will mean that there was no compliance with this requirement of ESTA. This would render the purported termination of the right of residence unlawful and invalid. It would also mean that there is no compliance with the requirement of ESTA that the eviction must be just and equitable.”[11]

[34] Barnes AJ in *Cosmopolitan Projects Johannesburg (Pty) Ltd v Leoa & Others*, [12] expressed herself as follows regarding section 9(2)(d) notice, which served as the notice of termination of the respondent’s right of residence and notice of eviction:

‘What is immediately apparent is that this is a Notice in terms of section 9(2)(d) of ESTA which purports also to terminate the first to fiftieth respondents’ rights of residence in terms of section 8 of ESTA. As Mr Botha who appeared for the thirty fifth to fiftieth respondents correctly submitted, this sort of hybrid approach is impermissible. A section 9(2)(d) Notice is correctly and appropriately issued only after an ESTA occupier’s right of residence has been validly and fairly terminated in terms of section 8.’[13]

- [35] The jurisprudential authority from these cases is that ESTA envisages a two-stage procedure in eviction, not a hybrid approach. A notice of termination of residence is issued first, and the notice of eviction in terms of section 9(2) follows.
- [36] The learned Magistrate did not pay any regard to the two-stage procedure that must be followed. Instead, the Magistrate paid much attention to the fact that the Respondents admitted that they were unlawful occupiers and occupied the property without the Applicant's consent.

Compliance with Section 11 of ESTA

- [37] The Applicant contended that he was entitled to an eviction order because the conditions for an order for eviction in terms of section 11 had been complied with. Sec 11(3) stipulates that in deciding whether it is just and equitable to grant an order for their eviction, 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 the suitable alternative accommodation is available to the occupier, (d) reasons for the proposed eviction, and (e) the balance of interest of the owner or person in charge, the occupier and the remaining occupiers on the land.
- [38] Except to mention that the provisions of section 11 had been complied with, the Applicant did not expand on how these provisions were complied with.
- [39] The Magistrate failed to address the non-compliance with sections 8 and 11 of ESTA, so the eviction order was not just and equitable.
- [40] Consequently, I cannot confirm the learned Magistrate's order. In the result, it is ordered that:
1. The order of the Magistrate is set aside in its entirety.

L Flatela

Judge of the Land Court

- [1] Section 19(3) provides: "Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, shall be subject to automatic review by the Land Claims Court, which may— (a) confirm such order in whole or in part; (b) set aside such order in whole or in part; (c) substitute such order in whole or in part; or (d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit."

- [1] Section 19(3) provides:

"Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, shall be subject to automatic review by the Land Claims Court, which may—

- (a) confirm such order in whole or in part;
 - (b) set aside such order in whole or in part;
 - (c) substitute such order in whole or in part; or
 - (d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit."
- [2] Section 19(3) provides: "Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, shall be subject to automatic review by the Land Claims Court, which may— (a) confirm such order in whole or in part; (b) set aside such order in whole or in part; (c) substitute such order in whole or in part; or (d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit."
- [2] Section 19(3) provides:
- [3] Termination of Right of residence (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.
- [3] Termination of Right of residence
- (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.

[4] Limitation on eviction (1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of the Court issued under this Act (2) The 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;

[4] Limitation on eviction

(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of the Court issued under this Act

(2) The 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;

[5]

[2020] 2 All SA 323 (SCA).

[6] Ibid para 13.

[7] 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.’

[7] 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.’

[8] 2017 (3) SA 545 (CC) (21 December 2016).

[9] Ibid para 56.

[10] Ibid para 67.

[11] Ibid para 75.

[12] [2019] ZALCC 1 (31 May 2019).

[13] Ibid para 34.

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Prepared on 11 October 2026 · Esheria