

SOUTH AFRICA / JUDGMENT

Van der Merwe and Others v Witbooi and Others (LCC29/2018, 03/2013) [2018] ZALCC 38 (7 September 2018) [2018] ZALCC 38

COURT
Land Claims Court

BEFORE
MP Canca, YS Meer

CASE / FILE NUMBER
LCC 29/2018

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IN THE LAND CLAIMS COURT OF
SOUTH AFRICA
HELD AT CAPE TOWN
(1)

REPORTABLE: YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED.

Before: Meer AJP and Canca AJ
CASE NO.: LCC 29/2018
MAGISTRATE'S COURT CASE NO.
03/2013
7/9/2018
In

the matter between:

ALWYN
JOHANNES VAN DER MERWE
1st
Appellant
SCHALK
WILLEM VAN DER MERWE
2nd
Appellant
ALWYN
JOHANNES VAN DER MERWE N.O.
3rd
Appellant
SCHALK
WILLEM VAN DER MERWE N.O.
4th
Appellant
MARGARETHA VAN DERT MERWE
N.O.
5th
Appellant
(The
Third to Fifth Appellants in their official
capacity
as trustees of the Agterland Family
Trust,
Trust No. IT 1904/2000)
and
MAXIN
WITBOOI
1st
Respondent
MARGIETA
WITBOOI
2nd
Respondent
MARCO
JOSEPH
3rd
Respondent
JEFFREY
JOSEPH
4th
Respondent
DEOREEN JOSEPH
5th
Respondent
CARLO
WITBOOI
6th
Respondent
AND

ALL OTHER PERSONS STAYING WITH
7th
Respondent
OR
UNDER THE FIRST TO SIXTH RESPONDENTS
ON
AGTERLAND PLAAS
CEDERBERG
MUNICIPALITY
8th
Respondent
THE
DEPARTMENT OF RURAL DEVELOPMENT
9th
Respondent
AND
LAND REFORM
Date
delivered: 07 September 2018

JUDGMENT

CANCA AJ

Introduction

- [1] This is an appeal against a judgment of the Citrusdal Magistrates Court, dated 20 November 2017. The appellants sought, unsuccessfully, the eviction of the first to sixth respondents[1], in terms of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA") from the farm, commonly known as Agterland, in the District of Citrusdal, Western Cape ("the farm").
- [2] The presiding Magistrate, in dismissing the eviction application, found that the disciplinary enquiry instituted by the appellants against the first respondent, where he was found guilty of the theft of one of his employer's sheep, was unfair. This conclusion was based on the Magistrate finding, inter alia, that the first respondent was illiterate, a first offender, that the chairperson of the disciplinary enquiry failed to consider granting the first respondent a final warning and that the "The speed with which the whole disciplinary process was steam rolled; clearly indicate[s] that the process could not have been just, given Witbooi's literacy level. In all probability this incident was just an excuse to get him of [sic] the farm before he turns 60 years old."
- [3] Insofar as the rest of the occupiers are concerned, the court a quo, relying on the judgment of *Klaase and Another v Van der Merwe NO and Others* 2016
- (6) SA 131 (CC), found that they were occupiers in their own right and that their right of residence had not been terminated in terms of the provisions of section 8 of ESTA.

The Parties

- [4] The first and second appellants are persons in charge of the farm and are cited, together with the third to fifth appellants, in their capacities as trustees of the Agterland Family Trust, Trust No. IT 1904/2000 ("the Trust"), the registered owner of the farm and the entity through which the farming operations are conducted.
- [5] The first respondent, who was born on 30 June 1958, is married to the second respondent. The third to sixth respondents are the first and second respondents' children and reside with them on the farm. The first to sixth respondents are hereinafter together referred to as "the occupier respondents". The eighth respondent is the local authority under whose jurisdiction the farm falls whereas the ninth respondent is the Government department vested with authority in matters falling under ESTA.

Background

- [6] The first respondent, who was 58 years at the commencement of the eviction proceedings, alleges that he joined his parents on the farm during the mid-1970s at the age of 18 and that he obtained consent to reside there from the farm's previous owners. He currently resides in a 5-roomed dwelling on the farm with his family, the second to sixth respondents. Although there is a dispute as to when he commenced employment on the farm[2], the first appellant does not deny that "The First respondent came to work and live on the farm around 1977." The first respondent's employment was terminated during April 2016, following the disciplinary enquiry alluded to in paragraph [2] above. The first respondent's disciplinary enquiry was preceded by him having been found guilty of theft of a sheep in the Citrusdal Magistrates Court, where he was sentenced to 12 months imprisonment, suspended for 5 years. In addition, he had to pay the Trust an amount of R1500.00 as compensation for the sheep.
- [7] The first respondent, unhappy that he had to compensate the Trust for the sheep, approached the Commission for Conciliation, Mediation and Arbitration {"CCMA"} for relief. The dispute was settled on the basis that the parties agreed that it was no longer necessary for the first respondent to pay the compensation of R1500.00. It is common cause that there is currently no dispute before the CCMA in respect of the first respondent.
- [8] The Trust formally terminated the first respondent's right of residence on the farm by notice dated 27 July 2016 after he was dismissed on 21 April 2016. The right of residence of the second to sixth respondents was also terminated on the basis that they were residing on the farm through and under the first respondent. The aforesaid notice also gave the occupier respondents 30 days to vacate the farm. The appellants instituted the eviction proceedings when the first respondent and his family failed to vacate the farm.

Merits

The status of the first respondent

[9] In the last two sentences of paragraph 6 and in paragraph 9 of his reasons for dismissing the eviction application, the Magistrate, in relevant part, states the following:

"6.The speed with which the whole disciplinary process was steam rolled; clearly indicates that the process could not have been just given Witbooi's literacy level. In all probability this incident was just an excuse to get him off the farm before he turns 60 years old.", and at

"9. If the time frame of the steam rolled process is taken into account, the literacy of Witbooi, and the fact that he, as he states in his Heads of argument, was of the opinion that after his conviction and sentence in the criminal trial [sic], and that he had to repay for the sheep, the case was settled, the process is unfair to consider dismissal as the only option."

[10] Mr. Montzinger, for the appellants, contended, correctly in my view, that the Magistrate erred in concluding that the appellants created the offence as an "excuse" to get rid of the first respondent before he turned 60. There was no basis for the court *quo* to come to that conclusion, particularly as the record reflects that the first respondent had pleaded guilty to the offence he was charged with. The disciplinary enquiry was conducted in the first respondent's home language, Afrikaans. Moreover, it is not the

first respondent's case that because of his illiteracy, he did not understand the difference between a plea of guilty and not guilty.

[11] It is common cause that the first respondent came to live on the farm with his parents. Mr. Papier, for the first to sixth and ninth respondents, contended that the first respondent's right of residence did not stem exclusively from his employment relationship but also from consent to reside with his parents, which preceded his employment. He therefore had consent to reside on the farm which flowed from another right in law, so the contention continued. Reliance for the contention was placed on *Snyders and Others v De Jager and Others* 2017 (3) SA 545 (CC) where the Constitutional Court held that it is not enough for an owner to comply with the provisions of section 8(2) when the occupier's right to residence does not stem solely from his employment. Mr. Papier then submitted that the appellants therefore had to comply with the provisions of section 8(1) as well.

[12] The first respondent obtained his right of residence from the consent of the previous owners of the farm. The appellants are bound by the provisions of section 24 of ESTA which provides for the succession of rights of occupiers regarding future owners. The Trust only became the registered owner of the farm in 2001 whereas the first respondent's employment agreement was only signed in April

2003. Consequently, I agree that the first respondent's right of residence stemmed from consent. Section 8(1) of ESTA had to be complied with in terminating his right of residence.

[13] Whilst I disagree with the Magistrate's reasons for dismissing the application for the first respondent's eviction, I agree that the application should also fail for the reasons that follow.

[14] According to section 8(1) of ESTA, termination of an occupier's right of residence must, inter alia, be just and equitable. This then begs the question whether the appellants complied with the provisions of that subsection when the Trust terminated the first respondent's right of residence on the farm. Section 8(1) reads as follows:

"8 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 Jaw 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."

[15] Section 8(1) requires the Court to consider "a// relevant factors and in particular" the criteria in sub-paragraphs (a) to (e), which I deal with in turn hereunder.

15.1. the first respondent's employment contract, which grants him and his family residence on the farm, in terms of clause 13 thereof, appears to be standard save that the annexure which sets out the terms and conditions for their use of the accommodation does not form part of the record. I shall, for purposes of this judgment assume that those terms and conditions are fair.

15.2. as regards sub-paragraph (b) of section 8(1), the conduct of the first respondent, stealing his employer's sheep, deserved a severe sanction. I agree with the appellants that his conduct justified the appellants' contention that the first respondent had fundamentally breached the trust between them and that the offence was serious enough to justify his dismissal. However, this is not the end of the enquiry.

15.3. as regards sub-paragraph (c), there can be no dispute that evicting the first respondent, who has lived on the farm for approximately 40 years, would cause him hardship. There is no evidence that the first respondent would, seamlessly move into other accommodation elsewhere. There is also no evidence that the appellants have offered to assist the first respondent in finding suitable alternative accommodation as required by section 10(3)(c). The appellants' will, of course, also suffer hardship should the right of residence not be terminated, as they would be

unable to allocate the residence to other employees on the farm whilst it is being occupied by someone who does not contribute to the farming activities. However, comparing the potential hardships of the parties, those of the first respondent clearly outweighs those of the appellants;

15.4. as regards sub-paragraph (d), there is no evidence that the first respondent had any expectation that his employment agreement and the housing benefits that flowed from it would be renewed after the effluxion of its time; and

15.5. as regards sub-paragraph (e), the Constitutional Court clarified the nature of the enquiry when interpreting this sub-paragraph. See *Snyders and Others v De Jager and Others* 2017

(3) SA 545 (CC) where the Court held that:

"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)."

The record does not show that the first respondent was granted an opportunity to "make representations why his...right of residence should not be terminated.", as set out in *Snyders* above. Given that the first respondent had been a resident on the farm for some 40 years, he ought, in my view to have been given this opportunity. The fact that he was convicted and punished does not detract from this. The termination of the first respondent's right of residence was accordingly not in compliance with section 8(1).

The status of the second to sixth respondents

[16] The Magistrate relied on the Constitutional Court judgment of *Klaase supra* in finding that the second to the six respondents were occupiers in their own right. In addition, relying on the provisions of section (8)(1)(e), he found that these respondents ("should have been granted an effective opportunity to make representations before a decision was made to terminate their right of residence. It was not done").

[17] It is not disputed that the second respondent has continuously and openly resided on the farm since her marriage to the first respondent on 30 July 2008. There is evidence that she, although not having done so for approximately 10 years, was employed as a seasonal worker on the farm for a number of years. Their children were all born on and live on the farm with their parents, save for their eldest, who has already flown the coop.

[18] It was argued on behalf of the appellants that the second to sixth respondents cannot have independent protection of ESTA as they associated themselves with the first respondent's illegal activities and that their right to occupy the farm flowed directly as a consequence of the first respondent's right of residence. This does not follow logically.

[19] According to Klaase, persons such as the second to sixth respondents are no longer regarded as residents who occupy under the rights of the head of the household. Klaase found that they are occupiers whose rights of residence flowed from consent in terms of sections 3(4) and 3(5) of ESTA.[3] See *Goedverdiend Plase (Pty) and Others v Andrews and Another LCC* 232/2017 (22 February 2018) at paragraphs 14 - 18 where Meer J considered the decision in Klaase.

[20] Mr. Montzinger, however, contended that the presumption in section 3(4) did not activate .in this matter as the appellants took a positive step to assert their rights and to define the relationship. This argument was based on the fact that the first respondent's housing agreement defined the status of persons such as the second respondent who came to live with the first respondent. This argument cannot succeed as it is counter to the principle established in Klaase which applies in respect of the respondents irrespective of the housing agreement.

[21] For the reasons set out above, the appeal cannot succeed.

[22] In the result, I order as follows:

1. The appeal is dismissed.
2. There is no order as to costs.

MP Canca

Acting Judge, Land Claims Court

I agree.

Y.S Meer

Acting Judge President

Land Claims Court

Appearances:

For the appellants:

Advocate G. Papier

Instructed by:

Van Wyk Van Heerden Attorneys, Paarl.

For the first to sixth respondents: Advocate A. Montzinger

Instructed by:

Rahman Incorporated, Kenwyn.

- [1] The citation of the seventh respondent appears to have been an oversight according to the heads of argument prepared by the appellant s' counsel.
- [2] The first appellants allege that the first respondent starting working on the farm as from 1992 whereas the first respondent states that this occurred as soon as he arrived on the farm during the mid-1970s.
- [3] Sections 3(4) and 3(5) read as follows: "3(4) For 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.

3(5) For purposes of civil proceedings in terms of the 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 the person in charge."

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