

SOUTH AFRICA / JUDGMENT

Visser and Another v Marthinus and Others (LCC 178/2022) [2023] ZALCC 10 (10 April 2023) [2023] ZALCC 10

COURT

Land Claims Court

BEFORE

Y S Meer, B Spilg

CASE / FILE NUMBER

LCC 178/2022

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FLYNOTES:

ESTA AND RESPECTIVE HARDSHIPS

LAND

TENURE – Eviction – Respective hardships –

Respondents employed on farm and provided accommodation

–

Continuing to stay for ten years after dismissal –

Appellants needing accommodation for other employees –

Hardship in finding alternative accommodation mitigated in that

they have enjoyed free accommodation for ten years at expense

of

farm owner – Eviction ordered – Extension of Security

of Tenure Act 62 of 1997.

IN THE LAND CLAIMS

COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC 178/2022

REPORTABLE

OF INTEREST TO OTHER

JUDGES

NOT REVISED

Before: The Honourable

Meer, AJP and Spilg, J

Heard
on: 10 March 2023
Delivered
on: 10
March 2023

In the matter between:

GERHARDUS JACOBUS
VISSER First
Appellant
(ID NUMBER:[...])
(First Applicant in the Application)
GERHARDUS JACOBUS
VISSER Second
Appellant
(ID
NUMBER:[...])
(Second Applicant in the Application)
and
JAN MARTHINUS
First
Respondent
(ID:[...])
LIEZEL MARTHINUS
Second
Respondent
CHANTELLE ALKASTER
Third
Respondent
AND ALL OTHER PERSONS
RESIDING
WITH OR UNDER THE
FIRST TO
THIRD RESPONDENTS IN
THE PREMISES
ON ONGEGUND FARM,
WELLINGTON Fourth
Respondent
DRAKENSTEIN
MUNICIPALITY Fifth
Respondent
PROVINCIAL DIRECTOR OF
THE DEPARTMENT
OF AGRICULTURE, LAND
REFORM AND
RURAL DEVELOPMENT
Sixth
Respondent

JUDGMENT

MEER, AJP

1. The appellants appeal against a judgment of the Wellington Magistrate's Court granted on 27 September 2022 which ordered the eviction of the first respondent from Ongegund Farm, Drakenstein Municipality, Western Cape in terms of the Extension of Security of Tenure Act No 62 of 1997 ("ESTA") and dismissed an application for the eviction of the second, third and fourth respondents. The eviction order against the first respondent was suspended pending the ability of the fifth and sixth respondents to provide him with alternative and/or emergency accommodation. In appealing against the order the appellants contend that an order for eviction of the second to fourth respondents ought also to have been granted.
2. The first appellant is the owner of the farm and the second appellant is in charge of the day to day farming activities. The first and second respondents are a married couple who were employed on the farm and provided accommodation thereon from 2008 until their dismissal on 9 September 2013. They originally started residing on the farm in June 1999, resigned and relocated, were re-employed for the period January 2001 to December 2007, relocated and again returned in 2008.
3. The third respondent is the daughter of the first and second respondent and lives with them. Her minor child as well as a minor child of the first and second respondents also resides with them.
4. On 2 July 2008 employment contracts were entered into between the appellant and the first and second respondent, respectively.
5. A housing agreement was entered into on 22 March 2012 between the appellant and the first respondent. The second to fourth respondent are listed in Clause 5 of the housing agreement as having permission to reside on the farm with or under the first respondent. The second respondent's employment agreement does have a discretionary provision for housing for her.
6. Even accepting the magistrate's finding that the employment agreement made provision for housing, it is not relevant given that the issues concerned events post 2013 when occupation was by consent.
7. The housing agreement makes clear that the second to fourth respondents reside on the farm by virtue of the housing agreement concluded with the first respondent. This being so, although the second to fourth respondents were employed and resided on the farm, their rights of residence flow from their relationship with the first respondent and from consent. In this regard they were clearly occupiers in terms of sections 3(4) and 3(5) of ESTA in that they resided openly on the farm with the knowledge of the appellants from at least 2008 and are still so residing.

8. The first and second respondents' employment relationship with the appellants was terminated on 9 September 2013 when they were dismissed due to absenteeism from work without reason and/or permission. Their dismissals were pursuant to a disciplinary enquiry. The respondents did not refer their dismissal to the CCMA, and whilst they challenged the fairness thereof in their answering affidavit some eight and a half years later, dated 14 Janaury 2022, this does not detract that no dispute pertaining to their dismissal was referred to the CCMA or dealt with in accordance with the provisions of the Labour Relations Act as required in terms of section 8(2)(a) of ESTA. Any potential labour dispute was not referred to the CCMA timeously and accordingly is finalised.
9. Since their dismissal in 2013 the respondents have continued to live on the appellants' farm. Since 2013 they have been occupiers by virtue of consent. The first and second respondents are currently employed elsewhere. The third respondent is unemployed and the minor children attend school in the area. An offer by the respondents to pay rent has been rejected by the appellants. The appellants contend that the relationship between them and the respondents has broken down irretrievably. This is not disputed by the respondents.
10. In their answering affidavit the first respondent states that they are not refusing to vacate out of spite or malice but because they have no alternative accommodation. The appellants counter that on two separate occasions whilst employed elsewhere, the respondents were able to obtain alternative accommodation, implying they could do so now.
11. A report by the fifth respondent Municipality indicated that the respondents do not qualify for emergency housing accommodation as "the household would most probably be able to address their needs from their own resources". The income of the household consisting of the three adults and two children, the report indicates, is about R7781.92 per month. This does not meet the definition of an indigent household and does not fall below the current poverty threshold of R4500 per month.

ON APPEAL

12. The second to fourth respondents are occupiers in their own right in terms of sections 3(4) and 3(5) of ESTA as alluded to above. This being so, in terms of section 9(2)(a) of ESTA an order for their eviction can only be granted if their right of residence has been terminated in terms of sec 8. The relevant subsection applicable to occupiers whose right of residence flows from consent is section 8(1). That section stipulates that their right of residence may be terminated provided that such termination is just and equitable, having regard to the relevant factors set out at section 8(1)(a) – (e). These need to be considered in turn.

S8(1)(a): The fairness of any agreement, on which the owner or person in charge relies

12.1 The respondents have been residing rent free on the appellants' property whilst working elsewhere for almost ten years since their employment was terminated. The respondents do not challenge the fairness of the agreement for their occupation in their assertion that they cannot move due to lack of alternative accommodation.

S8(1)(b): The conduct of the parties giving rise to the termination

12.2 The appellant has complied with all the procedural requirements specified at sec 9 of ESTA. The respondents have continuously refused to vacate the farm.

S8(1)(c): The respective hardships of the parties

12.3 Any hardship which the respondents may experience in finding alternative accommodation is in my view mitigated by the fact that they have enjoyed free accommodation for the past ten years at the expense of the appellants. They have rented premises before, are employed and there is some merit in the appellants' contention that they could obtain alternative accommodation as they did in the past when they relocated from the farm. By contrast the appellants have been providing free accommodation to the respondents in circumstances where it is undisputed that the relationship has broken down irretrievably. The respondent requires the accommodation for other employees. Given the circumstances, I am of the view that the interests of the appellants trump those of the respondents.

S8(1)(d): The existence of a reasonable expectation of renewal of the agreement

There was no such expectation.

S8(1)(e): Fairness of the procedure followed by the owner and the opportunity to make representations

This has been complied with. The respondents were invited to make representations on 18 January 2021 and they did so on 10 May 2021.

Compliance with section 9(2)(b) of ESTA

13. This section has been complied with. The respondents have not vacated the land within the period of notice given by the appellant.

Compliance with section 9(2)(c) of ESTA

14. Section 11 is applicable to the respondents given that they resumed their occupation in 2008. The requirements set out at sec 11(3) in deciding whether it is just and equitable to grant an order for their eviction, in essence mirrors those set out at sec 8(1) of ESTA which I have considered above. These have been complied with.

Compliance with section 9(2)(d) of ESTA

15. The procedural requirements stipulated at sec 9(2)(d) have been complied with.

Compliance with section 9(3) of ESTA

16. The requisite probation officer's report as required at sec 9(3) of ESTA was obtained.
17. In view of all of the above the requirements specified at sec 9(2) read with section 8(1) of ESTA have been complied with and an order for the eviction of the second to fourth respondents ought to have been granted by the Court a quo. This being so the appeal

succeeds. I intend granting the respondents a period of 6 months within which to vacate the farm and to vary the eviction order of the first respondent likewise. The conditional order for the latter's eviction, upon housing being available is in essence akin to no order, and Mr Magona for the respondents did not contend otherwise.

16. I grant the following order:

The order of the Court a quo is substituted with the following order:

1. The first to fourth respondents shall vacate the farm dwelling on Ongegund Farm remaining extent of farm number 1605, Division Paarl, Drakenstein Municipality, Western Cape Province, by 1 September 2023.
2. In the event of the respondents failing to vacate the said dwelling by 13 June 2023 the Sheriff for the area is authorised and directed to evict them on 4 September 2023.
3. There is no order as to costs.

Y S MEER

Acting Judge President

Land Claims Court

I agree

B SPILG

Judge

APPEARANCES

For the Appellants: Adv. B Brown

Instructed by Otto Theron Attorneys Inc.

For the First and Second Respondents: Mr. T Mgengwana

Maguga Attorneys Inc.

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Prepared on 10 October 2026 · Esheria