



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1012/2020

LCC Case No: 59/2018

In the matter between:

TIMOTHY MALULEKE N.O.

APPELLANT

(in his capacity as trustee of the
Hlaniki Trust IT 1101/2007)

(Applicant in the Court a quo)

and

DANIEL PHELLIMON SIBANYONI

FIRST RESPONDENT

(First Respondent in the Court a quo)

CITY OF TSHWANE METROPOLITAN

MUNICIPALITY

SECOND RESPONDENT

(Second Respondent in the Court a quo)

THE DIRECTOR-GENERAL: DEPARTMENT

OF RURAL DEVELOPMENT AND

LAND REFORM

THIRD RESPONDENT

(Third Respondent in the Court a quo)

Neutral citation: *Timothy Maluleke N.O. v Daniel Phellimon Sibanyoni and Others* (Case no 1012/2020) [2022] ZASCA 40 (04 April 2022)

Coram: MOCUMIE, MOLEMELA AND CARELSE JJA AND MUSI AND SMITH AJJA

Heard: 23 February 2022

Delivered: 04 April 2022

Summary: Land – Land Reform – Extension of Security of Tenure Act 62 of 1997 (ESTA) – termination of right of residence – were occupiers given an effective opportunity to make representations before termination of right to residence in terms of s 8(1)(e) – if not, was the termination of right of residence just and equitable.

ORDER

On appeal from: Land Claims Court, Randburg (Spilg J, sitting as court of first instance): judgment reported *sub nom Timothy v Sibanyoni and Others* (LCC/24/2009) [2009] ZALCC 8 (5 August 2020)

- 1 The appeal is dismissed.
 - 2 No order as to costs.
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JUDGMENT

Carelse JA (Mocumie, Molemela and Carelse JJJA and Musi and Smith AJJA – concurring)

[1] The central issue in this appeal is whether the termination of the first respondent's (Mr Sibanyoni) right to reside on a farm was just and equitable both in substance and procedure in terms of s 8(1) of the Extension of Security of Tenure Act 62 of 1997 (ESTA). This appeal is with leave of the Land Claims Court (LCC).

[2] The appellant, the Hlaniki Trust (the Trust) sought the eviction of Mr Sibanyoni, under ESTA from portion 5 (a portion of Portion 4) of the farm Tweefontein 541, Registration Division JR, Province of Gauteng (farm) measuring 498,8842 hectares. In 2015, the Trust bought the farm, from the previous owner, the Tweefontien Trust represented by Ms Viljoen without knowing about Mr Sibanyoni's occupation.

[3] Mr Sibanyoni, at the time of the application was 56 years old. He resided in a labourer's cottage on the farm with his wife, niece, nephew and mother. Subsequent to the launch of the application, Mr Sibanyoni's mother has since died.

[4] Both Mr Sibanyoni's parents resided on the farm. He was born and raised there. According to him, his late father and the previous owner had a verbal agreement in terms of which they were given rights to a portion of the farm which they used for cropping and grazing as part payment for their labour.

[5] The Trust disputed the agreement. It alleges that it was only in 2017, when the sheriff attempted to serve documents on Mr Johannes Sibanyoni, (the older brother of the appellant, Mr Sibanyoni) that it became aware that Mr Sibanyoni and his family resided on the farm. Furthermore, the Trust alleges that Mr Sibanyoni and Mr Johannes Sibanyoni shared a labourer's cottage on the farm.

[6] Disputing this, Mr Sibanyoni contends that he lived in a separate labourer's cottage on the farm. It is not disputed that Mr Sibanyoni has 30 cows and a number of goats and chickens. According to Mr Sibanyoni he was employed as a seasonal worker. However, it is common cause that he is not, and never was, employed by the Trust.

[7] In its founding affidavit, the Trust alleges that Mr Sibanyoni moved onto the farm after 4 February 1997 without the necessary consent. Notwithstanding this contention by the Trust, at the hearing of this appeal, the Trust conceded that Mr Sibanyoni is, in fact, an occupier.¹ Initially in issue, was whether Mr

¹ '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, but excluding—

(a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996); and

Sibanyoni arrived on the farm before or after 1997. However, during argument, the Trust conceded that Mr Sibanyoni arrived on the farm before 4 February 1997. Section 9(2) (c) of ESTA requires compliance with section 10 of ESTA, if the person to be evicted was already an occupier on 4 February 1997, and compliance with s 11 if the person became an occupier after 4 February 1997. It follows that the provisions of s 10² and not s 11³ in terms of ESTA apply.

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- (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
 - (c) a person who has an income in excess of the prescribed amount.

² Section 10 of ESTA provides that:

‘(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; or
- (d) the occupier—
 - (i) is or was an employee whose right of residence arises solely from that employment; and
 - (ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.

(2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.

(3) If—

- (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
- (b) the owner or person in charge provided the dwelling occupied by the occupier: and
- (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge.

A court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her. And whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—

- (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and
- (ii) the interests of the respective parties. Including the comparative hardship to which the owner or person in charge. The occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.

³ Section 11 provides as follows:

‘(1) If it was an express, material and fair term of the consent granted to an occupier to reside on land, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.

(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.

[8] The LCC dismissed the application for the eviction of Mr Sibanyoni and his family. It is common cause that if this Court finds that the Trust did not comply with s 8 of ESTA, it would be dispositive of the matter. There would be no need to deal with s 9⁴, and 10 of ESTA.

[9] This Court in *Aquarius Platinum (SA) (Pty) v Bonene and Others*⁵ re-affirmed the principle that ESTA envisages a two-stage eviction procedure. The first is a notice terminating the occupier's right to reside, thereafter a second notice of eviction in terms of s 9(2)(d)⁶ should be given to the occupier. Several letters purporting to terminate Mr Sibanyoni's right to reside were sent to him. However, it is not disputed that Mr Sibanyoni received a letter dated 12 February 2018, terminating his right to reside on the farm. It is trite that until an occupier's right to reside is terminated through the withdrawal of an owner's consent, an

(3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section. 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 suitable alternative accommodation is available to the occupier;
- (d) the reason for the proposed eviction;
- (e) the balance of the interests of the owner or person in charge. the occupier and the remaining occupiers on the land.'

⁴ Section 9 provides as follows:

'(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.'

⁵ *Aquarius Platinum (SA)(Pty) Ltd v Bonene and Others* [2020] ZASCA 7; 2020 (5) SA 28 (SCA); *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others* [2012] ZASCA 77.

⁶ *Ibid*, s 9 (2)(d).

occupier cannot be evicted. Mr Sibanyoni refused to vacate, as a result thereof, on 5 April 2018, the Trust launched an eviction application against Mr Sibanyoni and all those who occupy through him.

[10] Section 9(2)(a) of ESTA requires that the occupier's right of residence must have been terminated in terms of Section 8 of ESTA, which in relevant part, 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 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 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.'* (Emphasis added.)

Section 9(3) provides:

'(3) For the purposes of subsection (2)(c), the Court must request a probation officer contemplated in section 1 of the Probation Services Act, 1991 (Act No 116 of 1991), or an officer of the department or any other officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period –

- (a) on the availability of suitable alternative accommodation to the occupier;

- (b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;
- (c) pointing out any undue hardships which an eviction would cause the occupier; and
- (d) On any other matter as may be prescribed.

[11] The requirements for an eviction order are located in s 9(2) under ESTA. The right of residence of an occupier can, subject to certain exceptions which are not relevant in this case, only be terminated if it is just and equitable to do so, having regard specifically to five factors set out in s 8(1) of ESTA.

[12] In *Port Elizabeth Municipality v Various Occupiers*⁷ Sachs J analysed the phrase ‘just and equitable’ with reference to The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and said:

‘The phrase “just and equitable” makes it plain that the criteria to be applied are not purely of a technical kind that flow ordinarily from the provisions of land law. The emphasis on justice and equity underlines the central philosophical and strategic objective of PIE. Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complimentary and mutually reinforcing. The necessary reconciliation can only be admitted by close analysis of the factual specifics of each case. The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of ongoing stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it could approach questions of evidence, the procedure it may adopt, the way in which it exercises its powers and the orders it makes. The Constitution and PIE require that in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupiers and pay due regard to . . . broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.’ (Footnotes omitted.)

These remarks apply with equal force to ESTA.⁸

⁷ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) paras 35 & 36.

⁸ See *Herman Diedericks v Univeg Operations South (Pty) Ltd t/a Heldervue Estates* LCC 18/2011.

[13] The question that arises is whether the termination of Mr Sibanyoni's residence was just and equitable as required by s 8(1) of ESTA. This requires a court to consider '*all relevant factors*' and, in particular, the subparagraphs (a) to (e). The nature of the enquiry has been laid down by the Constitutional Court in *Snyders and Others v De Jager*⁹ where it was said:

'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 of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable.'

ESTA demands fairness and equity in all dealings with occupiers.

[14] The Trust submits that a court is called upon to determine *ex post facto*, whether the termination of the right of residence was lawful as well as just and equitable. I agree that the enquiry into whether the termination of the right of residence is lawful and just and equitable occurs *ex post facto*. However, this does not mean that the occupier must first be evicted. It only means that it happens after the termination, while the occupier still resides on the premises.

[15] In this case subparagraphs (a) and (b) of s 8(1) do not apply. The Trust does not rely on any agreement to seek the eviction of Mr Sibanyoni and neither is any reliance placed on the conduct of Mr Sibanyoni or any of his family members.

[16] Regarding subparagraph (c), the Trust alleges that not terminating Mr Sibanyoni's right of residence will result in hardship for the Trust. In its founding affidavit¹⁰ the Trust contends that,

'... it is suffering considerable hardship on account of being prevented from developing the area of the Farm in which the First Respondent resides. Furthermore, by virtue of the First

Snyders and Others v De Jager [2016] ZACC 55; 2017 (3) SA 545 (CC) para 56.
¹⁰ Founding Affidavit para 28.

Respondents continued occupation, the Applicant is prevented from accommodating current and/or prospective employees of the Applicant on the Farm. It is unjust and inequitable for the First Respondent to continue residing on the Applicants' Farm without giving any benefits to the Applicant and depriving its current and / or prospective employees of accommodation.'

[17] In response thereto, Mr Sibanyoni contends that:

'I hereby submit that me and my family have been occupying the portion of the farm that we are currently occupying, for a long period of time and it has not previously been an impediment to the development of the farm. Considering the size of the portion that we are occupying and its positioning on the farm, without assuming or suggesting that I am knowledgeable in this regard, it cannot reasonably be considered to be a disturbance to any prospective development, unless the contrary can be proven, in which case the Applicant is put to the proof thereof.'¹¹

[18] With regard to subparagraph (c), on the issue of comparative hardship, the LCC held that the termination of Mr Sibanyoni's right of residence will have a devastating impact and consequences for him. The information of the proposed development is scant and lacks particularity. No plans pertaining to the alleged development was attached to its founding affidavit. The further contention that the cottage was required for its employees and for operational needs of the farm appeared unfounded as there was no evidence as to how many labourers currently occupy the property or any other details or information pertaining to the operational requirements of the Trust and the farm. The Trust had to do more than make mere assertions that it will suffer hardship if it did not terminate Mr Sibanyoni's right of residence.

[19] Counsel for the Trust correctly submits that the *onus* is on the Trust to place information before the Court to enable it to have regard to the criteria listed under s 8(1)(a) to (e) and any other relevant factors. I agree that the hardship that Mr Sibanyoni would suffer if evicted far outweighs that of the Trust.

¹¹ Answering Affidavit para 31.

[20] It bears mentioning that the attitude of the Trust concerning the issue of alternative accommodation for Mr Sibanyoni and his family cannot be countenanced by any court. On the issue of alternative accommodation, the Trust submitted that it had established that there is a nearby township which could accommodate Mr Sibanyoni and his family. The Trust, thereby, ignores the undisputed fact that Mr Sibanyoni has livestock which require grazing land. This is not, ordinarily, possible in a township.

[21] Subparagraph (*d*) is not applicable. As far as s 8(1)(*e*) is concerned, the Trust contends in its Founding Affidavit that:

‘The Applicant submits that the procedure followed has been fair and that the First Respondent has been given ample opportunity and time to vacate the Farm and will be given an opportunity to make representations before the Honourable Court.’

[22] In *Snyders*¹² the Constitutional Court held:

‘In any event, even if it were to be accepted that Ms De Jager terminated Mr Snyders’ right of residence, she has failed to show, as is required by section 8(1) of ESTA, that there was a lawful ground for that termination and that, in addition, the termination was just and equitable. At best for Ms De Jager she purported to show no more than that there was a lawful ground for the termination of the right of residence. She did not go beyond that and place before the Magistrate’s Court evidence that showed that the termination of Mr Snyder’s right of residence was just and equitable.

. . . Counsel for the Snyders family also contended that the Magistrates Court should not have issued an eviction order because the Snyders family had not been afforded any procedural fairness by way of an opportunity to be heard before they were required to vacate the property. It is common cause that the Snyders family were never invited to make representations to Ms De Jager on why they should not be required to vacate the house before they were actually required to vacate it. In my view, the submission by Counsel for the Snyders family has merit. ESTA requires the termination of the right of residence to also comply with the requirement of procedural fairness to enable this person to make representations why his or her right of

¹² Footnote 9, paras 72 and 75.

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. . . .’

[23] The Trust submitted¹³ that the procedure adopted by it was fair. However, it is not stated what procedure is referred to. More telling is the further allegation that Mr Sibanyoni will have the opportunity to make representations before a court. This misconstrues the provisions of s 8(1)(e) which expressly states: ‘the fairness of the procedure followed by the owner or person, 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.’(Emphasis added.)

In this case it is common cause that the Trust did not engage with Mr Sibanyoni before terminating his right of residence.

[24] Counsel for the Trust submitted that para 75 in *Snyder’s* was obiter. I disagree. The Constitutional Court dealt with both the issue of substantive fairness and procedural fairness which were before it. Paragraph 75 dealt specifically with procedural fairness.

[25] The approach of the LCC on the issue of s 8(1)(e) cannot be faulted. The LCC held that: ‘Furthermore as I will indicate later, the fairness of the procedure followed must of necessity be case specific and a weighting must be given to it relative to the other factors. It may well be definitive in some cases while in others it may only be a factor carrying little or no weight. In short; whether it will be the silver bullet cannot be determined in isolation at this preliminary stage bearing in mind the extent of the disputed facts.’

¹³ See para 19 of this judgment.

[26] It is apparent from the record that the Trust was only prepared to engage with the erstwhile owner of the farm and not the occupier. There is no plausible reason why the Trust did not engage with Mr Sibanyoni before it terminated his right of residence. Given the particular hardship for Mr Sibanyoni that will flow from an eviction, in my view this is a case where there ought to have been ‘an effective opportunity to make representations before the decision was made to terminate the right of residence’ in terms of s 8(1)(e) of ESTA. According to Mr Sibanyoni, he was born on the farm. What is therefore clear is the fact that Mr Sibanyoni was on the farm prior to 4 February 1997. Had the Trust engaged Mr Sibanyoni before it terminated his right of residence, it would have appreciated the history of Mr Sibanyoni and his family’s occupation on the farm.

[27] The failure by the Trust to provide Mr Sibanyoni with an opportunity, let alone an effective opportunity, to make representations before terminating his right of residence is not reconcilable with the principles of procedural fairness as envisaged in s 8 of ESTA and confirmed in numerous judgments of this Court¹⁴ and the Constitutional Court¹⁵.

[28] As a result, the termination of Mr Sibanyoni’s right of residence was not just and equitable. In light of this finding, there is no need to deal with ss 9 and 10 of ESTA.

[29] In the result the appeal falls to be dismissed and the following order is made:

- 1 The appeal is dismissed.
- 2 No order as to costs.

¹⁴ See fn 5.

¹⁵ See fn 9.

Z CARELSE
JUDGE OF APPEAL

Appearances

For appellant: Mr G F Porteous
Instructed by: Cliffe Dekker Hofmeyr, Sandton
McIntyre van der Post Attorneys, Bloemfontein

For first respondent: Mr L Sefudi
Instructed by: Marivate Attorneys, Pretoria
Moroka Attorneys, Bloemfontein.

For third respondent: Mr K Toma
Instructed by: Office of the State Attorney, Pretoria
Office of the State Attorney, Bloemfontein