THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 148/2015

In the matter between:

TINA GOOSEN	**FIRST APPELLANT**
PIET GOOSEN	**SECOND APPELLANT**
BAREND TIETIES	**THIRD APPELLANT**
DIRK TITUS	**FOURTH APPELLANT**
KATRINA (KATHY) PIETERSEN	**FIFTH APPELLANT**
RYNO PIETERSEN	**SIXTH APPELLANT**
ADRIAAN AGULHAS	**SEVENTH APPELLANT**
AGNES VAN DER WESTHUIZEN	**EIGHTH APPELLANT**
DAANTJIE VAN DER WESTHUIZEN	**NINTH APPELLANT**
ELSA VAN DER WESTHUIZEN	**TENTH APPELLANT**
JACOBUS JULIES	**ELEVENTH APPELLANT**
JOHANNA VAN DER WESTHUIZEN	**TWELFTH APPELLANT**
ABRAHAM (APIE) SPANNENBERG	**THIRTEENTH APPELLANT**
JANA SPANNENBERG	**FOURTEENTH APPELLANT**
ADRIAAN VAN DER WESTHUIZEN	**FIFTEENTH APPELLANT**
JANA VAN DER WESTHUIZEN	**SIXTEENTH APPELLANT**
DAVID VAN DER WESTHUIZEN	**SEVENTEENTH APPELLANT**
THE DRAKENSTEIN MUNICIPALITY	**EIGHTEENTH APPELLANT**
THE MINISTER OF LAND AFFAIRS	**NINETEENTH APPELLANT**

and

THE MONT CHEVAUX TRUST (IT 2012/28)	**RESPONDENT**

Neutral citation: *Goosen v The Mont Chevaux Trust* (148/2015) [2017] ZASCA 89 (6 June 2017)

Coram: Shongwe ADP, Ponnan, Petse, Mbha and Van der Merwe JJA

Heard: 8 May 2017

Delivered: 6 June 2017

Summary: Land: eviction under Extension of Security of Tenure Act 62 of 1997: appeal against an order of the Land Claims Court confirming the eviction order of a magistrate's court on automatic review to it: nature of automatic review by the Land Claims Court: test on appeal: eviction order correctly confirmed by the Land Claims Court: constitutional obligation on municipality to provide emergency housing upon eviction: execution of the eviction order postponed and municipality ordered to provide emergency accommodation prior to execution of the order.

ORDER

On appeal from: Land Claims Court of South Africa, Randburg (Bertelsmann J sitting as court of review):

1 The appeal succeeds only to the extent indicated below.

2 The order of the Land Claims Court is altered to provide that the eviction order of the magistrate's court of Wellington is confirmed in respect of the first to sixteenth appellants.

3 The execution of the eviction order is suspended for a period of 90 days from the date of this order.

4 The Drakenstein Municipality (the eighteenth respondent in the court below) is ordered to provide the first to sixteenth appellants with temporary emergency accommodation within 75 days of the date of this order.

JUDGMENT

Van der Merwe JA (Shongwe ADP, Ponnan, Petse and Mbha JJA concurring):

[1] The facts of this case provide a stark illustration of the impact that the lack of adequate housing for all citizens has on South African communities. As I will show, the dreams of a well-meaning family in respect of a piece of farmland in the Boland, were shattered by the presence of a group of people on the farm that are living in appalling conditions but maintain that they have nowhere else to go.

[2] The respondent in the appeal, the trustees of The Mont Chevaux Trust (the trust), is the registered owner of the property known as the remaining extent of farm nr 208, Wellington, Division Paarl, Western Cape Province, commonly known as Silver Oaks farm (the farm). The farm was transferred to the trust on 13 July 2012. The farm is 28,0828 hectares in extent and is situated within the municipal area of the Drakenstein Municipality (the

municipality). The trust was established for the benefit of the Austin family, that is Mr and Mrs Austin and their nine year old daughter, all of whom reside on the farm. As I have indicated, the first to seventeenth appellants also reside on the farm.

[3] On 28 February 2013, however, the trust launched an application in the magistrate's court of Wellington for an order evicting the appellants from the farm. The trust also cited the municipality and the Minister of Land Affairs, as the eighteenth and nineteenth respondent respectively. The application was governed by the provisions of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The trust rightly accepted that the appellants were occupiers in terms of the provisions of ESTA. It also accepted that some of the appellants might have become occupiers of the farm prior to 4 February 1997 and therefore dealt with the matter as if s 10 of ESTA applied to the appellants. The trust delivered comprehensive affidavits and photographs in support of its application.

[4] The appellants opposed the application and were legally represented. However, only the tenth appellant deposed to an answering affidavit. She stated that the other appellants had mandated her to oppose the application, but they did not depose to confirmatory affidavits. This terse affidavit, however, contained little more than bare denials of the detailed evidence adduced on behalf of the trust and created no real or bona fide factual disputes. In the result the evidence of the trust was essentially undisputed.

[5] On 31 March 2014, the magistrate's court granted the application and ordered the appellants to vacate the farm on or before 31 May 2014. The eviction order was subject to automatic review by the Land Claims Court (the LCC) in terms of s 19(3) of ESTA. In a judgment delivered on 22 May 2014, the LCC (Bertelsmann J) confirmed the eviction order. Its order provided:

'The proceedings in the court a quo and the eviction order are confirmed.'

[6] The appellants approached the LCC for leave to appeal against its order. The LCC refused leave but this court subsequently granted leave to

appeal to it. In *Snyders & others v De Jager* [2016] ZACC 55; 2017 (5) BCLR 614 (CC), the Constitutional Court held that, provided the necessary leave was granted, an appeal against the confirmation of an eviction order by the LCC on automatic review to it, lies to this court. The trust filed a notice of intention to abide by the judgment of this court, citing financial constraints. In the light of what I have said, the issue in this appeal is whether the LCC was correct in confirming the eviction order of the magistrate's court.

[7] In order to answer this question, it is necessary to set out the background of the matter in some detail. On 24 November 2008 the farm was acquired by Corpclo 109 CC (Corpclo). At all times relevant thereto, Ms Karen Macaskill was the sole member of Corpclo. Corpclo acquired the farm for use by Ms Macaskill and her family as a high care thoroughbred stud facility. A number of people resided in the old cottages formerly occupied by labourers on the farm when Corpclo took occupation thereof. None of these occupiers were employed on the farm. The Macaskills soon discovered that, for reasons virtually identical to those that I will allude to shortly, life on the farm was intolerable and that it was impossible to operate the envisaged facility.

[8] As a result, on 4 November 2009, Corpclo instituted motion proceedings in the magistrate's court of Wellington for the eviction of these occupiers. It cited 27 occupiers as respondents as well as the municipality and the Minister of Land Affairs. The respondents in that application included the first to sixteenth appellants. These proceedings followed a rather peculiar course. For present purposes it suffices to say that an order evicting the occupiers was granted on an urgent basis in terms of s 15 of ESTA, but not executed. When the eviction order came before the LCC on automatic review, the matter was postponed for the filing of additional affidavits by Corpclo. The eviction order was neither confirmed nor set aside. Thereafter Corpclo ran out of funds, took no further steps to prosecute the application and offered the farm for sale.

[9] The Austins dreamt of acquiring a farm of their own. They owned a number of horses and their daughter showed an early interest in horses. They

were therefore specifically interested in a farm that was suitable for the keeping of horses. During their search for a suitable farm, they were introduced to the farm, which was developed as a horse farm. The Austins intended to reside on the farm and to make a living by providing livery for other people's horses and by renting out a flat and a bungalow. They noticed that there were people living on the farm. They were assured that an agreement had been reached between Corpclo, the occupiers and the municipality in terms of which the occupiers would be relocated. In terms of this agreement, Corpclo would purchase wendy houses and the municipality would provide land where the wendy houses were to be erected. For these reasons, the trust purchased the farm.

[10] The municipality, however, decided not to honour the agreement. It attempted to justify this decision by stating interchangeably that no land was available for the relocation or that building plans had not been submitted in respect of the wendy houses. The Austins received the news that the municipality had reneged from its undertaking when the transfer of the farm to the trust was about to be registered. They had made all their funds available to acquire the farm through the trust and could not cancel the transaction without losing dearly. They decided to take occupation of the farm and to attempt to resolve the issue of the relocation of the appellants amicably.

[11] This attempt soon proved to be fruitless. The appellants were uncooperative, to say the least. In addition, the Austins were confronted with a myriad of serious problems arising from the presence of the appellants on the farm. The appellants live almost in the middle of the farm, approximately a 100 metres from the main house. As a result of fighting and violence amongst the appellants and their visitors, the Austins are particularly over weekends virtually kept prisoners in their own house. For purposes of providing a safe environment and the provision of livery to clients, it is important that the farm be properly fenced. After informing the appellants that they intended to do so, the Austins repaired the perimeter fence of the farm. Within hours thereafter, the whole fence was damaged. The appellants and people from other farms come and go and move across the farm as they please and damage the fence

should it be in their way. As a result of repeated incidents of scaring of the horses, it is too dangerous to continue horse-riding on the farm. There are no proper ablution facilities for all of the appellants. In the result people relieve themselves in the open. These acts are witnessed regularly through the lounge window of the main house. There is excessive littering, also of the remains of slaughtered animals. There is continuous stealing of electrical cables for selling of copper and vineyards and trees are continuously chopped down for firewood.

[12] As a result, the Austins have been unable to provide livery to any client or to rent out the flat or bungalow. They have in fact been unable to invite anyone to their new home. They find themselves in an intolerable and desperate situation.

[13] Despite the fact that most of the appellants are employed on neighbouring farms and in town, they live in terrible conditions. Most of them gradually moved into dilapidated empty houses on the farm. These structures are on the brink of collapse and are closed up with plastic bags, cardboard and corrugated iron sheets. The ablution facilities available to the appellants are woefully inadequate. These structures are not fit for human habitation.

[14] Section 9(1) of ESTA provides that notwithstanding the provisions of any other law, an occupier may only be evicted in terms of an order of court issued under ESTA. Section 9(2) provides:

'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 Rural Development and Land Reform, 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 Rural Development and Land Reform 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.'

[15] I emphasise that this appeal lies against the confirmation order of the LCC made on automatic review. This raises the question as to the test to be applied by this court on appeal. In terms of s 19(3) of ESTA, the LCC is empowered to:

'*(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.'

[16] In *Snyders* (para 44) the Constitutional Court held that s 19(3) of ESTA gives the LCC wide powers to assess the appropriateness or otherwise of an eviction order, not only in respect of the procedure followed but also in respect of the merits thereof. The enquiry is similar, but not identical, to the oversight of certain convictions and sentences provided for in the Criminal Procedure Act 51 of 1977. In my view the s 19(3) enquiry is not subject to the limitations of an appeal. In essence the LCC must ensure that no occupier is evicted without compliance with ESTA, that is, that the eviction order is procedurally fair and substantially just in the circumstances of the given case.

[17] The appeal to this court, however, is subject to all the limitations applicable to appeals. The appeal is, for instance, limited to the grounds that

were raised in the notice of appeal, must be decided only on the appeal record and this court must be convinced that the LCC was wrong, taking into account the nature of the automatic review and the wide powers of the LCC.

[18] It appears from the judgment of the LCC that the papers in the application of Corpclo were before it and that it had regard thereto. Counsel for the appellants accepted that the papers in the previous application formed part of the review record and that this court is entitled and enjoined to have regard thereto.

[19] Counsel conceded, correctly in my view, that as the issue of the absence of a report by a probation officer in terms of s 9(3) had not been raised in the application for leave to appeal or the notice of appeal, it was impermissible to raise that issue before us. In any event, it appears from the record that despite repeated requests for and undertakings by the probation officer who visited the farm during September 2013 for purposes of compiling a report, one was not submitted by the time that the judgment was delivered in the magistrate's court on 31 March 2014. In terms of the jurisprudence of the LCC, the magistrate's court was entitled to proceed with the application on the basis that the report was not filed within a reasonable period of time. See *Theewaterskloof Holdings (Edms) Bpk, Glaser Afdeling v Jacobs en andere* 2002 (3) SA 401 (LCC) para 13 and *Pannar Research Farms (Pty) Ltd & another v Magome & another* 2002 (5) SA 621 (LCC) para 17. I now turn to the grounds of appeal raised in the notice of appeal.

[20] It was submitted that the trust presented insufficient evidence to show that the appellants' rights of residence had been terminated in accordance with s 8 of ESTA. The trust's founding affidavit stated that the attached affidavit of Ms Macaskill showed that notice of the termination of the appellants' rights of residence had been given when the South African Police Services handed a letter to them on 24 February 2010. Counsel correctly pointed out that the affidavit of Ms Macaskill made no reference hereto. But the previous application had been served on the first to sixteenth appellants. That application made it clear that the rights of residence of these appellants

had been terminated and set out the conduct foundational to the termination. As I have said, this conduct was substantially the same as the conduct described above. Despite the fact that that application was left in limbo, no reasonable person could have concluded that his or her right of residence had been revived and the appellants did not rely on such revival.

[21] It appears from the evidence that on 3 April 2009 Mr Leon Coetzee, a labour consultant employed by Corpclo, handed a notice to each of the households on the farm. The first to sixteenth appellants resided on the farm at the time. These notices, in Afrikaans, conveyed that consent to reside on the farm, if any, had thereby been terminated and that the occupier had to vacate the house on the farm on or before 30 April 2009. Although these notices referred to s 4 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, they afforded these appellants the opportunity to approach Corpclo and to make representations before Corpclo's application was issued. No-one made use of this opportunity. In principle and in the absence of prejudice to an occupier, there is no reason why a subsequent owner of land may not rely on a notice of termination of right of residence given by the previous owner of that land.

[22] In my view, the LCC should have concluded on the review record that the service of the previous application constituted just and equitable termination of the rights of residence of the first to sixteenth appellants and that they had an effective opportunity to make representations before the termination. There was, however, no compliance with s 9(2)*(a)* in respect of the seventeenth appellant, who moved onto the farm during June 2012. A reference to the appellants must hereinafter be understood as reference to the first to sixteenth appellants, unless the context indicates otherwise.

[23] Counsel's second argument was that the provisions of s 9(2)*(d)*(i) had not been complied with. The provisions of s 9(2)*(d)* are couched in peremptory terms. See *Molusi & others v Voges N O & others* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) para 33. The prescribed particulars are encapsulated in Form E of the Extension of Security of Tenure

Regulations. In terms of Form E particulars such as a summary of the grounds on which the eviction will be sought, must not only be contained in a written notice to the person in question, but must also be orally conveyed to him or her by the sheriff in an official language that he or she understands.

[24] In this regard the LCC said that the returns of the sheriff bore no resemblance to Form E. This is not surprising, as these were simply the returns of service of the trust's application that had been served on the appellants. They did not purport to constitute returns of service of notices in terms of s 9(2)*(d)*. The fact is that the trust gave no notice to the appellants as required by s 9(2)*(d)*.

[25] The LCC said that the appellants were fully aware of their rights even before the trust became the owner of the farm. It stated that in the absence of any possible prejudice to the appellants, insistence on technically correct service of notices in terms of s 9(2)(d) on the appellants would cause grave injustice to the trust and the Austin family. The LCC added:

'The facts of this matter demand that strict compliance with the service provisions of the Act and the regulations be waived in the interests of justice, equity and the need to prevent the administration of justice falling into disrepute by perpetuating injustice through the insistence on compliance with formalities.'

The LCC said that as a high court, it has the inherent power to waive and condone the non-compliance with ESTA and the regulations.

[26] These statements cannot be countenanced. The LCC was established by s 22 of the Restitution of Land Rights Act 22 of 1994 and is a creature of statute. It is unnecessary to determine whether the LCC has the inherent power to regulate its process in terms of s 173 of the Constitution, because it was not free to simply waive or condone non-compliance with peremptory statutory provisions. Subject to the proviso to s 9(2)*(d)*, its provisions had to be complied with. This does not, of course, mean that every deviation from prescribed formalities would be fatal. The test is whether the object of the peremptory statutory provision had been achieved. See *Maharaj & others v Rampersad* 1964 (4) SA 638 (A) at 646C-E and *Unlawful Occupiers, School*

Site v City of Johannesburg 2005 (4) SA 199 (SCA) para 22. The LCC ought therefore to have concluded that there had not been actual compliance with s 9(2)*(d)* in respect of the appellants.

[27] This, however, is not the end of the matter. The next question is whether the matter fell within the purview of the deeming provision in s 9(2)*(d)*. This question requires an interpretation of the phrase 'the date of the commencement of the hearing of the application'. The hearing of an application commences when the matter actually comes before the court. The ordinary meaning of the phrase is the date of the commencement of the hearing of the application by the court. The proviso does not refer to the date of set down of the application, irrespective of whether the hearing commences on that date or not. If that was intended, the legislature could easily have said so. On this construction, the occupier is provided with the application after he or she received notice of the termination of his or her right of residence. He or she is then afforded a period of at least two months prior to the commencement of the hearing in court to consider his or her position and to take the necessary steps to protect his or her rights. There is nothing in the context of ESTA that militates against the plain meaning of the phrase. On the contrary, experience tells us that the hearing of an application often does not commence on the date when it was initially set down. No reason for requiring two months' notice prior to a date other than the date of commencement of the hearing by the court, presents itself.

[28] The trust's application was served on the appellants and the other respondents therein on 11 March 2013. The notice of motion stated that the application would be made on 9 April 2013. The opposing affidavit was only deposed to on 23 May 2013, more than two months after the service of the application. The hearing of the application commenced early in 2014. In the circumstances I am satisfied that, on the aforesaid construction, the LCC should have found that the provisions of s 9(2)*(d)* had been complied with. The purpose of the provision had at any rate been achieved.

[29] I now turn to the argument in respect of s 10 of ESTA. There is no doubt that the provisions of s 10 had to be complied with in respect of each appellant individually. The trust presented evidence that the first appellant and the eighth appellant threatened the Austins on separate occasions. On 13 November 2012, Mr Austin went to the dwellings of the appellants to speak to them. On his arrival, the first appellant started shouting and said that the appellants would not leave the farm. She uttered a thinly veiled threat that harm will come to the horses on the farm and told Mr Austin that the appellants would make sure that the Austins leave the farm before the appellants do. On 1 December 2012 the eighth appellant came to the main house and shouted at the Austins that they will regret that they ever moved onto the farm. These incidents were unprovoked. On 22 January 2013 the eight appellant was part of a group of women who were cutting down trees for firewood. The first and eighth appellants therefore breached s 6(3) of ESTA.

[30] Counsel correctly contended that there is no evidence directly implicating any of the other appellants in the unlawful and distasteful conduct that I have described. However, there is no doubt, as counsel readily conceded, that but for the presence of the appellants on the farm none of this conduct would have taken place. Despite several approaches by the Austins, not one of the appellants made any attempt to alleviate the situation or distance themselves from the unlawful conduct. Instead they made common cause therewith and collectively displayed a hostile attitude towards the Austins. Each individual appellant by their physical presence over a protracted period and intimidating and hostile attitude contributed to the general intolerable situation. This is not the kind of situation where one or more of them can feign ignorance of what was happening on the farm or seek to hide behind a veil of anonymity. In the result each appellant caused a fundamental breach of the relationship between him or her and the Austins, as envisaged by s 10(1)*(c)* of ESTA. The LCC cannot be faulted for concluding that the conduct of the appellants justified an eviction order.

[31] It has to be accepted that the execution of the eviction order will render the appellants homeless. Because of this and because the appellants are in

any event presently living in conditions that seriously impair their human dignity, the municipality has a constitutional duty to provide them with emergency accommodation. As Yacoob J said in *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) para 24:

'The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.'

See also *City of Johannesburg v Changing Tides 74 (Pty) Ltd & others* [2012] ZASCA 116; 2012 (6) SA 294 (SCA) para 14.

[32] The magistrate's court ordered the municipality to report to it in respect of, inter alia, the steps it intended to take 'to resolve the problem of homelessness' of the appellants. The order of the magistrate's court specifically directed the attention of the municipality to the decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* [2011] ZACC 33; 2012 (2) SA 104 (CC).

[33] The report of the municipality was compiled during December 2013. The report painted a dire picture in respect of the availability of adequate housing within its area of jurisdiction. Out of some 60 000 households, about 31 000 are on a waiting list for the provision of houses. The report stated that in the event of the appellants qualifying for placement on the waiting list, they would not be provided with houses in the foreseeable future. But the issue is not whether the appellants should be given houses. The appellants cannot jump the queue. And although an owner of land may reasonably be expected to be 'somewhat patient' and to endure the presence of occupiers for some time, the owner cannot be expected to fulfil the obligations of the state or to provide free housing to the homeless for an indefinite period. See *Blue Moonlight* paras 40 and 97.

[34] What is in issue is the provision of emergency accommodation by the municipality upon the eviction of the appellants. Emergency housing is temporary and may be rudimentary. In its report the municipality acknowledged its constitutional obligation to provide emergency accommodation to the appellants. The municipality said that at the time of the

report it was unable to provide the emergency accommodation to the appellants. It pointed out, however, that it was in the process of developing an emergency accommodation facility. The report stated that it was expected that the construction of the facility would be completed during the period June to December 2014. The municipality therefore requested the magistrate's court 'not to grant the eviction order until the municipality is in a position to provide emergency housing'.

[35] When the matter came before the LCC on 22 May 2014, it should in these circumstances have made an order similar to the one made by the Constitutional Court in *Blue Moonlight*, namely, in essence, an order delaying the execution of the eviction order for a period of time and directing the municipality to provide the occupiers with emergency accommodation prior to the execution of the order.

[36] Such order should now be issued by this court. The appellants rightly did not seek an order as to costs.

[37] The following order is issued:

1 The appeal succeeds only to the extent indicated below.

2 The order of the Land Claims Court is altered to provide that the eviction order of the magistrate's court of Wellington is confirmed in respect of the first to sixteenth appellants.

3 The execution of the eviction order is suspended for a period of 90 days from the date of this order.

4 The Drakenstein Municipality (the eighteenth respondent in the court below) is ordered to provide the first to sixteenth appellants with temporary emergency accommodation within 75 days of the date of this order.

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C H G van der Merwe
Judge of Appeal

Appearances:

For the Appellants:	P R Hathorn SC
	Instructed by:
	J D van der Merwe Attorneys, Stellenbosch
	Webbers, Bloemfontein