THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 478/2018

In the matter between:

CEDRIC MORGAN JONES	**FIRST APPELLANT**
DIANE MORGAN JONES	**SECOND APPELLANT**
KERENZA MORGAN JONES	**THIRD APPELLANT**

and

SHAWN SUTHERLAND	**FIRST RESPONDENT**
JULIA SUTHERLAND	**SECOND RESPONDENT**

Neutral citation: *Jones & others v Sutherland & another* (478/2018) [2019] ZASCA 146 (14 November 2019)

Coram: Maya P, Tshiqi, Mokgohloa, Nicholls JJA and Dolamo AJA

Heard: 13 September 2019

Delivered: 14 November 2019

Summary: Eviction in terms of Extension of Security of Tenure Act 62 of 1997 – is it just and equitable to terminate the right of residence in terms of 8(1) and grant an eviction order – after balancing rights of the parties held that the eviction should be granted.

ORDER

On appeal from: Land Claims Court, Port Elizabeth (Canca AJ sitting as court of first instance):

1 The appeal is dismissed.

2 There is no order as to costs.

3 The first, second and third appellants are ordered to vacate the property known as Portion 40 of the Farm Witkoppie 373 IR, Midvaal, Gauteng, by no later than 29 February 2020.

4 Should the appellants fail to comply with the above order, the sheriff is authorised to evict the first, second and third appellants from the above-mentioned property.

JUDGMENT

Nicholls JA (Maya P, Tshiqi, Mokgohloa JJA and Dolamo AJA concurring):

[1] This is an appeal against the eviction of Mr Cedric Morgan Jones and Mrs Diane Morgan Jones, aged 78 and 76 years old respectively, together with their mentally disabled daughter, Ms Kerenza Morgan Jones, aged 48 years old. They are the three appellants herein. They reside on a farm in Meyerton, Gauteng described as Farm 373, Portion 40 Witkoppie IR, Midvaal. Mr Shawn Sutherland and Mrs Julia Sutherland, the respondents, are the registered owners of the farm. The appellants have been in occupation of the farm since July 2013, residing there rent-free since November 2013, a period of almost six years.

[2] The Sutherlands successfully launched an application for eviction of the elderly couple and their daughter in the Meyerton Magistrates' Court, Midvaal. The Joneses and all other occupiers were ordered to vacate the property within 3 months of the date of the

eviction order granted on 7 June 2017 by Magistrate E A Makda. On automatic review to the Land Claims Court, Canca AJ confirmed the eviction order and authorised the sheriff to facilitate the eviction should they fail to vacate by 1 December 2017. The Joneses appeal their eviction with the leave of this court.

[3] Both parties agreed that this is an eviction in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The mandatory requirements for the granting of an eviction order under ESTA are set out in s 9 which provides:

'(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 s 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 s 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.

(3) For the purposes of subsec (2)*(c)*, the Court must request a probation officer contemplated in s 1 of the Probation Services Act, 1991 (Act 116 of 1991), or an 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.'

[4] Section 9(2)*(a)* makes it clear that an eviction may only be ordered once there has been a lawful termination of the right of residence in terms of s 8. This is subject to compliance with procedural requirements specified in s 9(2)*(d)* and s 9(3). Therefore, where the right of residence is by consent, before any eviction is ordered, the starting point is s 8(1). In terms of this section an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable. The factors to be considered are:

'*(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.'

[5] Section 11 regulates evictions of persons who became occupiers after February 1997. Subsection (1) provides that:

'If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, 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.'

[6] Section 11(3) sets out what circumstances the court must have regard to when determining if an eviction is just and equitable. These are:

'*(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; and

(e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.'

[7] It is against this legislative framework that the facts of this case should be evaluated. A court is enjoined to weigh the competing rights of the parties, the right to security of tenure in respect of the occupiers and, in respect of owners, the right to their property.[1] Justice and equity have a determinative role to play.

[8] Mr Jones and Mr Sutherland entered into a one year verbal agreement of lease commencing on 1 July 2013. In terms of the agreement the main house on the farm was leased to Mr and Mrs Jones for the sum of R6 000 per month and a deposit of R8 000 was paid. It is common cause that as from November 2013 no further rentals were paid by them.

[9] According to Mr Jones, their non-payment was informed by the fact that on 28 October 2013 Mr Sutherland told them that he had sold the farm to a certain Mr John Hartley and was 'washing his hands of the whole place'. Although Mr Sutherland did not specify that the lease was terminated, Mr Jones interpreted this as a unilateral termination which amounted to a repudiation which he did not accept. He stated that he elected to uphold the lease agreement as the one year period had not expired.

[10] Mr Sutherland sent his first notice of termination of the lease agreement on 10 January 2014. In this notice he stated that the reason for the termination was that the property has been sold and that the new owner wanted to take vacant possession. When

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[1] *Daniels v Scribante & another* [2017] ZACC 13; 2017 (4) SA 341 (CC); *Molusi & others v Voges NO & others* [2016] ZACC 6; 2016 (3) SA 370 (CC) para 39.

this was ignored Mr Sutherland proceeded to sue Mr and Mrs Jones for the arrear rentals. Default judgment was later obtained.

[11] Mr Jones alleged that because they did not vacate voluntarily, Mr Sutherland, by his actions attempted to constructively evict them. He illegally cut off their electricity supply. This is disputed by Mr Sutherland who provided an affidavit from an Eskom employee that the electricity had been cut off due to non-payment, on instruction from Eskom.

[12] Mr Jones set out a litany of alleged misconduct by Mr Sutherland and/or Mr Hartley, acting alone or in concert. In addition to cutting the electricity of the Joneses, this also included removal of their water pumps, destruction of water tanks, destruction of solar panels, damage to their tractor, breaking of windows and other malicious damage to their property. Mr Jones estimated that they suffered damages in the sum of R600 000 as a result of this unlawful conduct. Mr Sutherland in turn alleged that his property was vandalised by the Joneses.

[13] Mr Jones laid a charge of malicious damage to property against Mr Sutherland and his son. During the course of 2014 they were both found guilty and Mr Sutherland was sentenced to a fine of R10 000 or 12 months imprisonment suspended for 2 years on condition that they were not found guilty of malicious damage to property in the period of 2 years.

[14] The next ‘notice of eviction’ was sent by Mr Sutherland through his attorneys in a letter dated 13 February 2015. In this letter Mr Jones was informed that default judgment had been obtained against him, the lease had been cancelled, and he had been verbally requested both by Mr Sutherland and his attorneys to vacate the property which he had refused to do. They were given 30 days to vacate the property. This was ignored by Mr and Mrs Jones who claimed they were then subjected to further acts of vandalism. The cables from the pump room to the water tank were cut, electric cables were taken and their livestock let loose.

[15] The final notice was sent to the Jones family by the Mr Sutherland's attorneys on 16 November 2015. In this letter it was stated that the verbal lease expired on 31 August 2015 through effluxion of time. The date is clearly an error as, on Mr Jones' own version, the fixed period of the verbal lease expired on 6 July 2014. The letter purported to cancel the lease and the Joneses were given 30 days within which to vacate. It was further alleged that they had caused damage to the property. This notice was served personally on all three appellants by the sheriff.

[16] The cancellation letter was followed by a Form E Notice of intention to apply for an eviction order in terms of s 9(2)*(d)*(i) of ESTA and a similar Form F Notice to the Municipality and the Department of Land Affairs to apply for an eviction in terms of s 9(2)*(d)(*ii) and (iii). Form G is a notice in terms of s 10(1)*(b)* of ESTA headed 'Notice of Breach of Material and Fair Term of Agreement Between Owner/Person in Charge and Occupier '. It set out the grounds on which there had been a breach of the agreement, which was the non-payment of rental. It also recorded the cancellation of the lease. All three notices were served personally on Mr and Mrs Jones, on 10 June 2016, by the sheriff who recorded that he explained the contents thereof to them. Because of her disability, service on their daughter was effected by serving on Mr Jones.

[17] A social worker's report from the Gauteng Provincial Department of Social Development was prepared in anticipation of the application for eviction. The first report is dated 12 January 2017. It set out the circumstances of both parties and their respective attitudes. By October 2015 both Mr and Mrs Jones were receiving old age pensions and their daughter was receiving a disability grant.

[18] The Joneses indicated that they stopped paying rent because they had been deprived of their livelihood and their farming equipment had been damaged. The Sutherlands in turn said they caused the damage because the Joneses had stopped paying rent. Mrs Jones suffers from Bell's palsy and an autoimmune disease, apparently due to stress. Nonetheless they were determined to remain in occupation with their two horses and five cats and 12 dogs. Mr Sutherland responded that he was being deprived

of his only income as a result of the non-payment of rent and suffers from rheumatoid arthritis and gastric ulcers.

[19] It is clear that the farm was, and still is, in a state of disrepair and dilapidation. The damage to the house had not been fixed, the house was not insulated, there were broken windows and it was ice cold in winter. The social worker's recommendation was that it was not in the Joneses' best interests to remain on the property – it was far from a hospital in case they needed medical help and they had no motor vehicle. It was proposed that they should move to a place nearer to medical facilities and where they would have electricity and running water. Significantly, the social worker observed that this was not a case where the family has nowhere to go but rather a case where 'they will not leave the property, because they need to prove a point, and in the process they are harming their own welfare and health and that of their disabled daughter, as they are not planning for their future'.

[20] When the matter was first heard in the Magistrates' Court, Mr and Mrs Jones complained of the inadequacy of the social worker's report in that it did not pertinently address the issues required by s 9(3) of ESTA. These are (a) the suitability of alternative accommodation; (b) how the eviction would affect the respondents; and (c) any undue hardship they would suffer. The magistrate requested a supplemented report from the Department of Social Development as well as a report by the Department of Rural Development and Land Reform.

[21] The report provided by the Department of Rural Development and Land Reform dates the dispute between the parties to as early as September 2013 when there was an argument over whether the rent was due on the first day of the month, as alleged by Mr Sutherland, or the seventh of the month, as alleged by Mr Jones. Apart from concluding that the appellants did not have anywhere to go except with the intervention of the municipality, a recommendation was made that they be given time to seek alternative accommodation.

[22] The supplemented social worker's report dealt with the three issues set out in s 9(3) of ESTA. As regards alternative accommodation, it was established that Jeugland Old Age Home in Vanderbijlpark could accommodate all three appellants if they received a government pension and Mr and Mrs Jones had children who may be able to contribute financially. Avontrus Old Age Home in Vereeniging indicated that they were able to accommodate the couple if they paid R4 500 per month, but not their daughter. The social worker concluded that the appellants' constitutional rights as envisaged in s 9(3)*(b)* would not be compromised if they moved to an old age home.

[23] As regards the question whether the eviction would result in undue hardship, the social worker pointed out that the appellants were the only people on the land, which they had occupied for a relatively short period. Thus, they have no historical or sentimental attachment to the land. They have spent no money on upgrading the property. They have been evicted from other properties in the past so this is not an unknown process to them. The social worker concluded that it is in the best interests of the three appellants that they be placed in an old age home where they would have access to electricity, running water and medical attention when needed. This would ensure that their constitutional right to dignity was taken into consideration.

[24] At the first appearance in this court the appellants were unrepresented. Counsel provided by the Department of Rural Development, and who drafted the heads of argument, had been instructed to withdraw. The matter was postponed to ensure that the appellants were provided with legal representation. This court is grateful to Mr Zietsmann for taking on this task pro amico at short notice.

[25] The appellants' original heads of argument were adopted by Mr Zietsman, with the exception of the applicability of s 8(1). He argued that the relevant section was s 11(3), and eschewed any reliance on s 8(1). This submission misconstrues the structure of ESTA.[2] Although s 11(3) largely mirrors and complements s 8(1) with regard to the requirements of what is just and equitable, where the right of residence is by consent, the

[2] *Molusi* fn 1.

first step is to lawfully terminate the right in terms of s 8. Compliance with 8(1) does not necessarily mean that the remedy of eviction is available to the landowner. However, an eviction can only take place once the prerequisites set out in s 8(1) are met.[3]

[26] The mandatory requirements for granting an eviction are set out in s 9(2) of ESTA.[4] At s 9(2)*(a)*, reference is made to the termination of a right of residence in terms of s 8. To reinforce the view that s 8 is applicable rather than s 11, s 8(1)*(d)* provides that one of the factors to be considered is the reasonable expectation of a renewal of an agreement after the effluxion of time. Therefore, even when an occupier's consent to reside on the land is terminated through effluxion of time, a landowner is not absolved from compliance with s 8(1). When dealing with an eviction pursuant to a lease agreement, the first hurdle is whether there was a lawful termination of the right of residence.

[27] In this matter the right of residence arose from a verbal agreement which had to be terminated on lawful grounds. That the Joneses' right of residence, which survived the expiry of the period of lease, was terminated on lawful grounds was denied by the appellants. Reference is made to the various erroneous cancellation notifications. Although the respondents sent several abortive notices to vacate, by the time the matter was heard in the Magistrates' Court there had been a lawful cancellation of the lease. The appellants had been notified verbally; the lease was cancelled in the attorneys' letter of 6 November 2016, albeit with the incorrect expiry date; the lease was cancelled in terms of the Form G notice, which was served personally on the appellants.

[28] The right of residence having been lawfully cancelled, the next question is whether it was just and equitable, at both a substantive and a procedural level, having regard to the factors set out in s 8(1)(*a)-(e)*.[5] There is no suggestion that the period of the verbal lease or the terms thereof was unfair in terms of s 8(1)*(a).* Nor was there a reasonable expectation of the renewal of the agreement after the effluxion of time as set out in s

[3] *Mpedi & others v Swanevelder & another* 2004 (4) SA 344 (SCA); *Mkangeli & others v Joubert & others* 2002 (4) SA 36 (SCA) para 13.
[4] *Yarona Game and Guest Farms (Pty) Ltd v Mashinini & others* 2017 JDR 1959 (LCC) para 12.
[5] *Snyders & others v De Jager & others* [2016] ZACC 55; 2017 (3) SA 545 (CC) para 56.

8(1)*(d).* The real bone of contention was the conduct of the parties giving rise to the termination in terms of s 8(1)*(b).* The appellants contended that the respondents were not blameless. They vandalised the property in order to get rid of the appellants. The appellants' counsel argued that this conduct amounted to a constructive eviction before the effluxion of the period of the lease. The respondents' hands were dirty and when dealing with social legislation like ESTA, such conduct should not be countenanced. The eviction should accordingly not have been granted. Implicit in this argument is that the appellants should be permitted to stay on the property rent-free for as long as they wish.

[29] It is, of course, correct that the respondents' actions were unacceptable. Mr Sutherland was convicted and sentenced for his conduct. However, the appellants are not paragons of virtue either. They admit that they have not paid rent since November 2013. This was prior to any acts of damage to the property. As at 16 February 2016 they were R168 000 in arrears. The respondents allege that the appellants have damaged the property and that they steal items from the property which they sell. Even assuming in favour of the appellants, the respondents' conduct can hardly entitle the appellants to live on the farm in perpetuity. They state that they would move if they were compensated for their damages but this is insufficient reason to oppose an eviction which is clearly in their best interests. If the appellants have a damages claim as they allege, then this should be pursued in the correct forum.

[30] In terms of s 8(1)*(c)* the interests of the parties and the comparative hardship each of them will suffer must be taken into consideration. The appellants state that as a result of the respondents' conduct they have lost their livelihood. This is not entirely correct. Their horses were confiscated by the SPCA and the appellants are facing charges relating to neglect of animals. Their cattle were stolen. The respondents are not responsible for this state of affairs.

[31] From its preamble, it is apparent that ESTA was primarily designed to provide security of tenure for the most vulnerable and marginalised members of our society, farmworkers, whilst also balancing the rights of landowners. The appellants are

undoubtedly vulnerable, but this is not a situation of a wealthy landowner pitted against a destitute farm worker. The respondents themselves are elderly and not in the best of health. They are not affluent people and their main income is derived from the rental generated by their farm. They have been deprived of that income since November 2013, for almost six years. The respondents require payment of the substantial arrears in rental for their own well-being. This now totals in excess of R400 000, an amount which they are unlikely to recoup.

[32] As regards s 8(1)*(e),* the appellants have been given ample warning of the termination of their lease. The appellants, on their own version, were made aware that the property was to be sold on 28 October 2013 and that they would have to vacate. They remain in occupation as of today. Although there is nothing on record to indicate that the appellants were given a formal right to make personal representations to the respondents, there is reference to various verbal interactions between the parties when Mr Sutherland attempted to cancel the lease. In any event, the wording of s 8(1)*(e)* does not make it peremptory for representations to be made in every case but rather that a fair procedure be followed 'including whether or not the occupier should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence'.[6] It should be borne in mind that when the eviction was ordered by the Magistrates' Court and confirmed by the Land Claims Court, the appellants had had ample opportunity to make representations to the Department of Rural Development and the social worker. Their views were put across on three different occasions, all of which were duly recorded and placed before court. Viewed holistically, the procedure may have been defective at times but it has not been unfair to the appellants.

[33] In my view the right of residence has been validly terminated in terms of s 8(1) and is in accordance with the dictates of fairness. The procedural requirements in terms of ss 9(2) and 9(3) have been met. All that remains is to determine whether the eviction is in accordance with the justice and equity prescripts of s 11.

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[6] *Le Roux NO v Louw* 2017 JDR 1033 (LCC) paras 91-93.

[34] The only argument of substance put up was that the available alternative accommodation is not suitable. The appellants do not want to reside in an old age home. They wish to remain on the property where they can keep their livestock and numerous domestic pets. Unfortunately, it is not open to the appellants to oppose their eviction on the grounds that the farm is their residence of choice. Where an eviction is going to render persons homeless, a constitutional obligation rests on the relevant municipality to provide suitable accommodation. This does not mean that the appellants can continue to occupy the farm until they are provided with accommodation to their liking.[7]

[35] The inescapable fact is that the appellants are living in deplorable conditions. The social worker has noted that their continued occupation on the farm is compromising their health and safety and that their constitutional rights would be infinitely better catered for in an old age home. The respondents have been deprived of their property for nearly six years. In balancing the rights of both parties, justice and equity demands that the appeal be dismissed.

[36] No costs were awarded in the Land Claims Court and the respondents have abandoned their prayer for costs in this court.

[37] In the result the following order is made:

1 The appeal is dismissed.

2 There is no order as to costs.

3 The first, second and third appellants are ordered to vacate the property known as Portion 40 of the Farm Witkoppie 373 IR, Midvaal, Gauteng, by no later than 29 February 2020.

4 Should the appellants fail to comply with the above order, the sheriff is authorised to evict the first, second and third appellants from the above-mentioned property.

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[7] *Baron & others v Claytile (Pty) Ltd & another* [2017] ZACC 24; 2017 (5) SA 329 (CC) para 46.

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C Heaton-Nicholls

Judge of Appeal

APPEARANCES:

For the Appellants:	P J J Zietsman
Instructed by:	Kgaugelo Baloyi Incorporated, Pretoria
	Matsepes Attorneys, Bloemfontein
For the Respondent:	S D Maritz
Instructed by:	Odendaal Erasmus & Thulane Incorporated, Meyerton
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