THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 230/2008

In the matter between:

KIEPERSOL POULTRY FARM (PTY) LTD **APPELLANT**

and

GIDEON PHASIYA **RESPONDENT**

Neutral citation: *Kiepersol Poultry Farm v Phasiya* (230/2008) [2009] ZASCA 119 (25 September 2009)

CORAM: **Mpati P, Van Heerden, Jafta, Maya, Snyders JJA**

HEARD: **12 May 2009**

DELIVERED: **25 September 2009**

SUMMARY: Land – land reform – eviction in terms of Extension of Security of Tenure Act 62 of 1997 – whether occupier still occupies premises/land in terms of the Act.

ORDER

On appeal from: Land Claims Court (Bam JP).

The appeal succeeds. The order of the court below is set aside and replaced with the following:

'1. The respondent is ordered to vacate the house he currently occupies on the farm Zandspruit by no later than 31 January 2010.

2. Should the respondent fail to vacate the house by due date, the sheriff is authorised to remove the respondent and his dependants from the said house together with all their belongings and to hand over vacant possession to the appellant.'

JUDGMENT

MPATI P (Van Heerden JA, Jafta JA, Maya JA and Snyders JA concurring)

[1] This is an appeal against the judgment of the Land Claims Court (Bam JP) dismissing the appellant's application for an order for the eviction of the respondent from a house on a certain farm, Zandspruit, in the district of Krugersdorp. The application was brought in terms of the Extension of Security of Tenure Act[1] ('the Act'). The appeal is with leave of this court.

[2] The appellant, a company with limited liability, leases the farm Zandspruit from a property holding company, Sojordi Beleggings (Edms) Bpk, the owner of the farm. It conducts the business of poultry farming and processing on Zandspruit. Its policy, according to its managing director, is to house its employees on the land on which it conducts its business. The respondent's father, Mr Sam Phasiya ('Sam'), was one of the employees of the appellant. He was the driver of a delivery van and occupied one of the

[1] 62 of 1997.

houses on Zandspruit with his family. (I shall refer to the house that was occupied by Sam as 'the premises'.)

[3] It is not in dispute that prior to the year 2004 one of Sam's three sons, Mr Martin Zolile Phasiya ('Martin'), purchased a fixed property and moved out of the premises. It is also not in dispute that during 2004 Sam was involved in a motor vehicle accident, as a result of which he sustained physical injuries for which he required medical attention. He was not required to drive the delivery van again after the accident. He retired on pension in September 2004.

[4] In the appellant's founding affidavit Mr Jan Hendrik du Plessis ('Du Plessis'), the managing director of the appellant, states that during February 2004 Sam and his wife 'moved out of the dwelling which they were occupying on the premises [Zandspruit] and began residing with [their] son Martin in Honeydew'. The other two sons, the respondent and Mr Lucas Phasiya ('Lucas'), remained behind together with the respondent's wife and three minor children. Du Plessis states further that during the course of 2004 Lucas and the respondent were advised that 'they would have to vacate the premises by the end of January 2005'. It appears that Lucas then moved out because, during the course of January 2005, the respondent's employer (a firm of attorneys) requested that the date upon which the respondent was to vacate the premises be extended until 30 April 2005. Du Plessis agreed. When the respondent failed to vacate the premises on due date the appellant issued the requisite notices, in terms of s 9(2)(d)[2] of the Act, of his intention to apply for an order to evict the respondent.

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[2] 'Section 9(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,

[5] In his answering affidavit the respondent disputes the allegation that his father left the premises to reside with Martin. He states that –

'My father did leave the farm after the accident but only for a short period, the reason being that my mother did not have access to the necessary resources to allow her to take care of my father. When he left he went to stay with my brother Martin temporarily and would return as soon as his medical condition improved. My father returned to the property after his condition improved. To date, he is still resident on the property.'

The respondent states further that Sam 'sometimes visits either one of my brothers,' and that he (respondent) and his family therefore 'occupy the farm under my father'. To the respondent's allegation that Sam 'qualifies as an occupier in terms of s 8(4) of [the Act]' and that his rights of residence have neither been terminated nor relinquished by him, the appellant avers in reply that Sam gave up his right of residence during February 2004.

[6] On 31 January 2007 the court a quo granted an order, by agreement, that evidence be adduced in respect of the respondent's 'special defence' that he was not occupying the premises in his own right but under his father, who was still an occupier in terms of s 8(4) of the Act. After it had considered the evidence tendered from both sides, including the evidence of Sam, the court a quo found that Sam 'never abandoned his homestead at Kiepersol but merely spent more time at the more comfortable house of his son, Martin, while allowing [the respondent] to be keeper of the family home on his behalf'. The court accordingly dismissed the appellant's application for an order of eviction.

[7] An 'occupier' is defined in the Act as '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 . . . '. Section 8(4) of the Act reads:

> 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.'

'The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-

(a) has reached the age of 60 years; or

(*b*) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,

may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (*a*), (*b*) or (*c*): . . . '.

The appellant does not dispute the fact that Sam was an occupier on the premises, but avers that he gave up his right of residence during February 2004 when he allegedly moved out of the premises to reside with his son, Martin. On the appellant's version s 8(4) of the Act does not apply, because Sam's right of residence was never terminated. It is Sam who abandoned it. And because the respondent does not himself claim to be an occupier as defined in the Act, but rather contends that he occupies the premises under Sam, the issue to be decided in this appeal is whether, at the time the eviction proceedings were commenced, Sam was an occupier in the sense that he was still residing on the premises. Counsel for the appellant conceded in this court that if Sam was still residing on the premises at the relevant time, then the appeal must fail.

[8] In *Ex parte Minister of Native Affairs*[3] this court was concerned with the interpretation of the word 'resides' in s 10(3) of Act 38 of 1927.[4] The court said:

'In construing the word "resides" one must bear in mind what was said by Solomon J in *Buck v Parker* (1908 TS at p 1104) where the learned Judge said:

> "The word 'residence' is one which is capable of bearing more than one meaning, and the construction to place upon it in a particular statute must depend upon the object and intention of the Act. As was said by Earle CJ, in *Naef v Mutter* (CP p 359), 'Residence has a variety of meanings according to the statute in which it is used"'.'[5]

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[3] 1941 AD 53.
[4] The notorious Black Administration Act.
[5] At 58.

This court has held, recently, that the main purpose of the Act 'is to regulate the eviction process of vulnerable occupiers of land' and that the Act 'generally seeks to protect a designated class of poor tenants occupying rural and peri-urban land . . . with the express or tacit consent of the owner against unfair eviction from such land'.[6] The term 'residing' in the definition of an 'occupier' in the Act must thus be construed with this purpose in mind.

[9] In *Mkwanazi v Bivane Bosbou (Pty) Ltd*[7] one of the issues the court was called upon to determine was the meaning of the term 'reside' in the definition of 'labour tenant' in the Land Reform (Labour Tenants) Act 3 of 1996.[8] Gildenhuys J (Moloto J concurring) adopted the meaning ascribed to the word 'reside'[9] by Baker J in *Barrie NO v Ferris*,[10] viz:

'"[R]eside" means that a person has his home at the place mentioned. It is his place of abode, the place where he sleeps after the work of the day is done . . .. It does not include one's weekend cottage unless one is residing there . . .. The essence of the word is the notion of "permanent home".'[11]

Just as the Act regulates the eviction of vulnerable occupiers of land, the Land Reform (Labour Tenants) Act regulates the eviction of labour tenants.[12] I can find no reason why I should not adopt in this case, as Gildenhuys J did in *Mkwanazi*, the meaning ascribed to the word 'reside' by Baker J in *Barrie NO v Ferris (supra)*. There could be no dispute that at least before February 2004 Sam's permanent home was the premises on Zandspruit. He resided there.

[10] Du Plessis testified that at the beginning of February 2004 Sam told him that he was no longer staying on the farm and that he and his wife had left to live with his son, Martin, in Honeydew, because it was 'a lot nicer there' than on the farm. However, Sam continued to work for the appellant until September 2004 when he was involved in an accident and subsequently went

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[6] Per Maya JA in *Lebowa Platinum Mines Ltd v Viljoen* 2009 (3) SA 511 (SCA) para 9. See also *Hallé v Downs* 2001 (4) SA 913 (LCC) para 12.
[7] 1999 (1) SA 765 (LCC).
[8] The relevant part of the definition reads: 'Labour tenant' means a person-
(a) who is residing or has the right to reside on a farm; . . .'.
[9] At para 8.
[10] 1987 (2) SA 709 (C).
[11] Ibid at 714F.
[12] See *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA) para 21.

on retirement. Thereafter, Du Plessis saw him twice, so he testified, once when Sam enquired about his pension payout and on the second occasion when Sam asked him for a loan when there was a death in his family. Du Plessis testified further that around February/March 2004 he gave written notice to the respondent that the respondent should vacate the premises by January 2005. Du Plessis confirmed that he had agreed to the request by the respondent's employer for an extension of the date for vacation of the premises to the end of April 2005. The respondent, however, failed to vacate the premises by due date. During February 2007 and approximately two weeks before the trial of this matter, Du Plessis conducted an inspection of the premises.[13] According to Du Plessis, the respondent's wife, who was present, informed him that she and her husband used the main bedroom while the children slept in the smaller room. She also informed him that Sam did not sleep on the premises but only came to visit 'from time to time'.

[11] Mrs Selinah Chunga ('Chunga') is employed by Du Plessis's mother as a domestic worker. She occupies a house in a compound close to the premises. Chunga testified that Sam left the premises in about September 2004 when his son, Martin, had purchased a house, but he continued to work on the farm. In cross-examination she said that Sam left the farm in February 2004, but moved his belongings in September 2004. She did not see him moving his belongings personally and was informed of this by her children.

[12] The third and last witness for the appellant was Mr Josias Thilu Mmbodi ('Mmbodi'). His evidence may be summarised as follows. He has been employed by the appellant since 1991 and lives in a compound on Zandspruit. He is employed as a mechanic and also collects post, using a company vehicle. Sam worked for the appellant until September 2005[14] when he was involved in an accident. His duties were to do deliveries of produce.

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[13] The house consists of three rooms, a large room used as a combined kitchen and sitting-room, a main bedroom, a smaller room attached to the kitchen/sitting-room and a bathroom area.

[14] The year 2005 is obviously incorrect as it seems common cause that it was 2004. The witness conceded that he did not recall when asked if he was certain about the year.

One morning (he could not remember the date) Sam informed them[15] that his son had bought a house for him at Northriding. Normally, Sam did not work on Saturdays and Mmbodi stood in and performed his duties. When Mmbodi knocked off at approximately 13h00 he would deliver the company vehicle to Sam at Northriding and the latter would use it to come to work on Mondays. The routine of leaving the vehicle with Sam on Saturdays lasted until Sam had an accident. When it was put to him in cross-examination that Sam would testify that he had never moved out of Zandspruit and that he merely occasionally went to visit his sons, Mmbodi disputed the statement and testified that at the end of the day's work Sam no longer went to the premises and that 'he used to go out, away from the yard'. Mmbodi last saw Sam in December 2004.

[13] Four witnesses testified for the respondent, namely Martin, Lucas, Sam and the respondent. As the court below correctly observed, their evidence is substantially the same on the question whether Sam was still residing on the premises at the time of the institution of the eviction proceedings. The respondent testified that he, together with his wife and three children, lives with Sam on the premises. He agreed that he and his wife used the main bedroom, but stated that when Sam was on the premises he (Sam) used the main bedroom. He maintained that Sam was still fully resident on the premises. After the accident (in about September 2004) Sam had stopped working. From that time, Sam would 'typically' stay for a total of two weeks of every month (about three days per week) on the premises, the rest of the month being spent with Martin at his house. When asked how often Sam was on the premises he answered: 'Well, it depends, maybe like a week . . . he might be there once or twice a week.' When his parents were on the premises he and his wife moved to the children's room. Under cross-examination the respondent conceded that after the accident Sam did leave the premises for a short while 'to stay with my brother'. He maintained, however, that even before the accident Sam was staying with Martin for a few days every week,

[15] The witness uses the word 'us', supposedly referring to himself and other workers.

spending the rest of the week on the premises. According to the respondent, this pattern had continued after the accident and his father's retirement.

[14] The respondent admitted to receiving a notice from the appellant to vacate the premises. On being asked why he had approached his employer to negotiate an extension of time rather than ask Sam to intervene (especially if Sam was still residing on the premises), he said: '. . . there is a time whereby everyone is confused and then he does not know what to do.' He did not honour the agreement to vacate the premises in January 2005, he said, because he could not just leave his father.

[15] Martin's evidence may be summarised as follows. He lived on the premises for more than 20 years and moved out during about May 2004 when he purchased a three bedroomed house in Sundowner. His parents used to spend about three nights per week at his house from the time he moved into the house. Sam 'took ill' in about September 2004 when he was involved in an accident, whereafter he stayed with Martin for approximately nine weeks. From January 2005 Sam 'rotated' amongst him (Martin), his brother Lucas and the premises. That arrangement, in terms of which Sam would spend three days with Martin, two days with Lucas, who by now had his own house, and two days on the premises had, according to Martin, already been in place prior to Sam's accident. It was re-instated in about January 2005 and continued until Sam suffered a stroke, after which he remained with Martin for about two months. When his health improved, however, Sam reverted to the rotation arrangement. Martin testified further that before the accident Sam used to travel between his (Martin's) house and the farm, on the nights he was staying with Martin, using the appellant's vehicle. Since Sam had suffered the stroke Martin used his own vehicle to convey Sam to and from the farm. Martin testified that his agreement with his parents was that they could stay with him 'for visits', but that they would have to leave his house once he got married. His parents had started using his post office box as their postal address in 2006. This was because some of the post addressed to them at the premises had gone astray. In fact, all the members of his family, even his brother, Lucas, utilised the post office box.

[16] Lucas is Sam's eldest son. He lives at Fourways with his wife and four children in their three bedroomed house. Lucas testified that after the accident and after he had suffered a stroke Sam did not reside permanently on the premises. The three brothers had met and decided that Sam and his wife should rotate amongst them, especially between him and Martin. In terms of that agreement Sam would spend three days with Martin and two days with Lucas. In the past, Sam had already been visiting them as they were 'a very close family'. Lucas testified that Sam suffered a stroke 'after he got news that he [was] not allowed to stay on [the premises]'. According to Lucas Sam changed his postal address from that of the appellant to Martin's postal address because he 'had been told to move out . . . '.

[17] Sam testified that he worked for the appellant for 28 years and stopped after he had had an accident in 2004. He was told by Du Plessis, he said, that he should not return to work. When asked where he resided 'currently' he responded as follows:

'I stay with my kids . . .. I stay three days [with] Martin, two days [with] Lucas and two days [with] Gideon per week.'

He later said that he spent 'most of my time at Martin's place because I am not well'. Sam also testified that the respondent 'stays at my place at Kiepersol . . . where they removed me', but that he had not left the premises. He said that while he was still employed he 'was just visiting Martin'. He confirmed that Mmbodi's testimony about his delivering the company vehicle to him at Martin's house was correct but he denied that this occurred every Saturday. He spent more time at Martin's house because Martin had a vehicle and a telephone in the house. He would call Martin when he took ill. Unlike on the premises there was also a bath in Martin’s house. He would not be able to stay with Martin forever, however, as Martin would one day get married. Sam denied that he had changed his postal address and stated that his post was still being sent to the appellant’s address.

[18] The court a quo appears to have rejected Du Plessis’s testimony that Sam had told him in February 2004 that he was staying with Martin and no longer on the premises. The court reasoned thus:

‘There is undisputed evidence from both Mr Sam Phasiya and from his son, Martin, that Martin only took occupation of his house during May 2004 and so Sam Phasiya could not have [had] prior experience in February that it was “a lot nicer” there than staying on the farm . . . It is inconceivable that Sam Phasiya could have evinced and communicated a resolve to permanently abandon his residence on the farm during February 2004 even while still employed on the farm and had not yet been securely anchored in accommodation elsewhere.’

I do not share this view. It was never put to Du Plessis that his evidence on this issue was untrue. What was indeed put to him was the following:

‘ . . . I need to put to you what my instructions are and we will call him Sam for want of a better term, we’ll say that he never said to you that he was vacating the premises in February 2004, he said that his son had purchased a new house and that he would occasionally be staying there and occasionally be staying on the farm . . .'.

Du Plessis’s further evidence that he gave notice to the respondent in or about February/March 2004 to vacate the premises was not seriously challenged either. Although he was unable to pin a date to it, the respondent admitted to having received written notice that he should vacate the premises. In my view, the court a quo’s rejection of Du Plessis’s evidence on this issue was unjustified.

[19] There are other aspects of the case that, in my view, tend to strengthen the appellant’s version. First, Du Plessis’s testimony that the respondent’s wife had informed him that Sam did not sleep on the premises but ‘only comes and visits from time to time’ was not challenged. When he was confronted with this evidence the respondent merely responded: ‘I do not know about it.’ Second, it is difficult to understand why, if Sam still resided on the premises, the respondent did not object to the notice to vacate the premises and tell Du Plessis that Sam, and not he, was the occupier. He testified that he conveyed this fact to his employer when handing the written notice to him. Yet he instructed his employer, an attorney, to request an extension of time rather than to assert Sam’s right of residence as an occupier. When questioned why he did not ask Sam to intervene by talking to Du Plessis the respondent replied that he had been confused. In my view, the respondent’s conduct of requesting an extension of time within which to vacate the premises, evinces

knowledge on his part that Sam was no longer residing on the premises. Fourth, there is contradictory evidence on the question of Sam's alleged rotation amongst his sons.

[20] In his evidence-in-chief the respondent testified that the rotation arrangement had been in place since September 2004. Under cross-examination he stated that the alleged rotation commenced before Sam's accident. Martin's version on this point was that after the accident Sam 'resided' at his (Martin's) house and that from January 2005 'he would basically rotate amongst myself, my brother [Lucas] and the farm'. However, Martin also testified under cross-examination that the rotation arrangement had been put in place prior to Sam's accident in September 2004. Lucas was unclear on when Sam's rotation had commenced. He testified that at some stage after the accident Du Plessis told Sam that the latter was 'not allowed to stay on the farm'. Thereafter Sam suffered a stroke and they decided that they 'will keep him more at our place'. Lucas also testified that before Du Plessis had informed Sam that he was not allowed on the farm Sam had already begun to rotate. According to Sam, however, the rotation commenced when he took ill, ie when or after he had had the accident. In my view, these contradictions cannot be disregarded, particularly when regard is had to the fact that the respondent makes no mention whatsoever in his answering affidavit of Sam's alleged rotation amongst his sons.

[21] The court a quo found, despite Chunga's evidence to the contrary – which turned out to be hearsay – that Sam had not removed his furniture from the premises. I agree with this finding. But the court also held that an important indicator of an intention 'to abandon one's residence permanently is to move lock stock and barrel and take away one's furniture and clothing'. While it is so that the furniture and clothing may be an important indicator that a person has not left or changed his residence, that will not necessarily be a decisive factor. In the present matter Martin's house and that of Lucas were fully furnished. It would thus not have been necessary for Sam to take his furniture with him. After all, his other son, the respondent, who, on his own version, had no furniture of his own, remained on the premises. Had Sam left

with the furniture, the respondent would have been left in an empty house. In these circumstances, not much weight, if any, can be attached to the fact that Sam had left his furniture on the premises.

[22] Other factors considered by the court a quo in arriving at its conclusion that Sam 'is still the occupier' of the premises were, according to it, 'the ample and undisputed evidence that the farmhouse and life itself was always an important focal point in the life of Sam Phasiya even after February 2004 and that he maintained contact with his son [the respondent]', and that Sam buried his brother on the farm and still attended church services at a neighbouring church. It is manifest that Sam at all times must have held the view that he was entitled to lay claim to the premises. This is evidenced by his leaving the respondent on the premises and the contact that he maintained with him. But, to repeat what was said in *Barrie v Ferris NO*[16] the essence of the word 'reside' is the notion of 'permanent home'. As indicated, Du Plessis's evidence that the respondent's wife informed him, shortly before the trial, that Sam did not sleep on the premises and only visited from time to time was not disputed. Failure on the part of the respondent to challenge this evidence, taken together with his failure to object to Du Plessis's notice to him to vacate the premises and his failure to even inform Sam, on whose behalf he was allegedly keeping the premises, about the notice – he testified to this effect – in my view strengthens the appellant's version that Sam had ceased to reside at the premises prior to his accident and retirement in September 2004. And above all, the court a quo found Du Plessis to be a credible witness, correctly so, in my view. Mr Mmbodi's testimony that, already before the accident (in September 2004), Sam no longer slept at the premises but left the farm after work, is corroboration for Du Plessis's version.

[23] I am accordingly satisfied that on the evidence before the court a quo Sam was no longer an occupier of the premises as envisaged in the Act at the time the eviction proceedings were instituted. In coming to this conclusion I have placed minimal value on Chunga's evidence. This is so because

[16] Above, n 9.

according to her Sam left the premises in or about September 2004. Even on the respondent's version the so-called rotation by Sam commenced before the accident, which occurred in September 2004. There are other unsatisfactory aspects in her evidence which I find unnecessary to enumerate here.

[24] The conclusion I have reached does not dispose of the matter. The appellant instituted the eviction proceedings 'in terms of [the Act]'. According to the appellant, therefore, the respondent is an occupier of the premises. It is not in dispute that during the first half of 2004 the respondent was given notice that he should vacate the premises in January 2005. In January 2005 the appellant granted to the respondent an extension of time until 30 April 2005, by which date the respondent was required to vacate the premises. The respondent was therefore occupying the premises with the appellant's consent. There was no evidence that the respondent had an income in excess of R5 000 per month, which would have taken him out of the definition of 'occupier'.[17] In a report filed with this court in terms of s 9(3) of the Act, the project officer in the office of the Acting Provincial Chief Director of the Department of Rural Development and Land Reform records that the respondent and his wife rely on income 'from their low paying jobs'. In my view, it can safely be assumed that the respondent's income is not in excess of R5 000 per month. He was therefore an occupier as defined in the Act at the time the eviction proceedings were instituted.

[25] In terms of s 8(1) of the Act an occupier's right of residence may be terminated on any lawful ground,

'provided that such termination is just and equitable'.

In considering whether such termination is just and equitable, the subsection requires that regard be had

'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;

[17] In terms of s 1(1)(c) of the Act a person who has an income in excess of R5 000 per month is excluded from the definition of 'occupier'.

(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.'

This court has held that the question whether or not the termination of an occupier's right of residence is just and equitable must be considered from the perspective of both the owner (or person in charge of the land) and the occupier.[18]

[26] The appellant gave notice to the respondent that his occupancy of the premises would be terminated in January 2005. The period of occupancy was extended by agreement to 30 April 2005. There was no suggestion, and there could not have been any in my view, of any unfairness in the agreement. As to the provisions of s 8(1)(b) and (c), the appellant's policy is to house its employees on Zandspruit. The respondent is not, and never was, an employee of the appellant. He occupies the premises in which the appellant wishes to house one of its employees. There will, in my view, almost always be hardship experienced by a person who has to vacate land as a result of his/her right of residence having been terminated. But that hardship has to be balanced against the hardship suffered by the owner or person in charge of the land. The respondent occupies the premises without paying any rental while the appellant is unable to house one of its employees in terms of its policy. In my view, this is a clear case where the interests of the appellant should take precedence. The provisions of s 8(1)(d) are not relevant as there could be no expectation of the renewal of the agreement. The procedure followed by the appellant in terminating the respondent's right of residence cannot be faulted (s 8(1)(e)). Having considered all the relevant factors I am

[18] *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) para 12.

persuaded that the termination of the respondent's right of residence on the premises is just and equitable.

[27] The provisions of s 9(2)(a) and (d) have been met:[19] The respondent's right of residence has been terminated in terms of s 8 and the requisite notices were given (s 9(2)(d)).[20] The respondent, as occupier, has not vacated the premises (s 9(2)(b)). What remains for an eviction order to be issued is compliance with the conditions for an order of eviction in terms of s 11.[21] Section 9(3) reads:

'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 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.

I have mentioned above (para 24) that the report envisaged in s 9(3) (I shall refer to it as 's 9(3) report') has been made available to us, albeit after the matter was argued. I may mention that only the appellant was legally represented when this appeal was argued in this court. The respondent was not represented at all and no legal submissions were filed on his behalf. But after arrangements were made by the relevant officer for an interview with the respondent for purposes of the s 9(3) report, a request was lodged by Mphilo Attorneys on behalf of the respondent, to allow them to present argument before us, alternatively to file written submissions. The respondent's lack of representation on the day of the appeal was ascribed to a lack of funds. We

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[19] Section 9(2) is quoted above at n 2.
[20] Referred to above para [4].
[21] Section 10 is of no relevance since the respondent became an occupier after 4 February 1997.

allowed Mphilo Attorneys to file written submissions and granted an opportunity to the appellant's counsel to respond to them.

[28] In the s 9(3) report the officer concerned has recorded that no alternative suitable accommodation is readily available for the respondent, that the respondent and his mother have unsuccessfully submitted numerous applications for 'RDP' houses and that it is highly unlikely that they would be given preference in the allocation of such houses. The report is silent, however, on whether or not the respondent is able to rent accommodation, or whether his brothers, Martin and Lucas, whom we know each owns a three bedroomed house, are unable to accommodate him whilst he is searching for suitable alternative accommodation. It is also stated in the report that two of the respondent's children attend school 'in and around the subject property' and that an eviction order against the respondent 'will have a negative impact' on their education. The report highlights the difficulty which the respondent is experiencing in finding alternative accommodation as an undue hardship which an order of eviction would bring about.

[29] It was an express and fair term of the consent granted to the respondent to reside on the premises that the consent would be terminated upon a fixed date, viz 30 April 2005. An order for his eviction may therefore be granted if it is just and equitable to do so (s 11(1) of the Act). In deciding whether it is just and equitable to grant an order of eviction s 11(3) requires that regard be had to (a) the period that the respondent has resided on the premises; (b) the fairness of the terms of any agreement between the parties; (c) whether suitable alternative accommodation is available to the respondent; (d) the reason for the proposed eviction; and (e) the balance of the interests of the appellant, the respondent and the remaining occupiers of the land. I have already dealt with (b), (d) and (e) above (para 26) when I considered the provisions of s 8(1). The respondent has lived on the premises since childhood, but only became an occupier from the first half of 2004. He is relatively young at 40 years – he was born on 21 May 1969 – and should be able to adjust relatively easily to a new environment.

[30] In my view, it will be just and equitable, in the circumstances of this case, to grant an order of eviction. I consider, though, that the respondent should be afforded sufficient time within which to secure suitable alternative accommodation. In deciding what constitutes sufficient time I also take into account the fact that two of the respondent's children attend school in, or close to, Zandspruit. Their schooling, at least for the rest of the current academic year, should not be disrupted.

[31] Before the s 9(3) report was delivered to this court, the appellant's attorneys filed a copy of a death certificate evidencing Sam's demise on 27 March 2007. In their written submissions Mphilo Attorneys argued on behalf of the respondent, that the court a quo erred in not enquiring *mero motu* into the question whether or not the respondent's mother was an occupier in her own right. It was therefore urged upon us that should it be found that the appellant was entitled to the relief it seeks, the matter be remitted to the court a quo for the hearing of evidence on her right of residence.

[32] The respondent's mother was not and is not a party in this matter and her right of residence was never at issue before the court a quo. The suggestion that the matter be remitted to it for the hearing of further evidence has no foundation.

[33] In his heads of argument counsel for the appellant also sought a costs order against the respondent. Before us, however, he made no submissions supporting such an order, although he did not go so far as to abandon it. In my view, this is not a case where the respondent should be burdened with a costs order.

[34] The appeal succeeds. The order of the court below is set aside and replaced with the following:

'1. The respondent is ordered to vacate the house he currently occupies on the farm Zandspruit by no later than 31 January 2010.

2. Should the respondent fail to vacate the house by due date, the sheriff is authorised to remove the respondent and his dependants from the

said house together with all their belongings and to hand over vacant possession to the appellant.'

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JUDGE OF APPEAL

Counsel for Appellant	:	R Beaton
Instructed by	:	Erasmus Scheepers PRETORIA
Correspondent	:	Honey Attorneys BLOEMFONTEIN
Counsel for Respondent	:	None
Instructed by (Respondent)	:	Gideon Phasiya c/o Assenmacher Attorneys BRYANSTON
Correspondent	:	None