# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
# JUDGMENT

**Reportable**
Case no: 1084/17

In the matter between:

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|---|---|
| **NEDERBURG WINES (PTY) LTD** | **APPELLANT** |
| and | |
| **FRANS NERO** | **FIRST RESPONDENT** |
| **FRANSOIWA BAADJIES** | **SECOND RESPONDENT** |
| **JERAET NERO** | **THIRD RESPONDENT** |
| **GERALDINE DU TOIT** | **FOURTH RESPONDENT** |
| **VERONICA DU TOIT** | **FIFTH RESPONDENT** |
| **ALL OTHER PERSONS RESIDING AT THE PROPERTY AT HOUSE NUMBER 4 ON THE NEDERBURG ESTATE, THE REMAINDER OF FARM 604, IN THE MUNICIPAL AREA OF THE WINELANDS DISTRICT COUNCIL AND REGISTRATION DIVISION OF PAARL** | **SIXTH RESPONDENT** |
| **DRAKENSTEIN MUNICIPALITY** | **SEVENTH RESPONDENT** |

**DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM** **EIGHT RESPONDENT**

**Neutral citation:** *Nederburg Wines (Pty) Ltd v Nero & others* (1084/17) [2018] ZASCA 119 (20 September 2018)

**Coram:** Shongwe ADP and Majiedt, Mbha, Mocumie and Makgoka JJA

**Heard:** 27 August 2018

**Delivered:** 20 September 2018

**Summary:** Land – eviction under Extension of Security of Tenure Act 62 of 1997 – appeal against order in unopposed application – application dismissed without benefit of probation officer's report – such report mandatory and valuable – execution of eviction order suspended – municipality ordered to provide temporary emergency accommodation.

## ORDER

**On appeal from:** Land Claims Court of South Africa, Randburg (Ngcukaitobi AJ sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the court a quo is set aside and replaced with the following:

'2.1 The first to fifth respondents are evicted from the property as described in paragraph 1 of this judgment.

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

2.3 To the extent necessary, the Drakenstein Municipality (the seventh respondent in the court a quo) is ordered to provide the first to the fifth respondents with temporary emergency accommodation within 60 days of the date of this order.

2.4 The Drakenstein Municipality is ordered to file a report on whether temporary emergency accommodation has been provided to the respondents to the Registrar of the Land Claims Court within 20 days from the date of expiry of the 90 days referred to in paragraph 2.2 above.'

## JUDGMENT

**Shongwe ADP (Majiedt, Mbha, Mocumie and Makgoka JJA concurring)**

[1] This appeal is against the order of Ngcukaitobi AJ dismissing an unopposed eviction application against the first to fifth respondents in the Land Claims Court (Randburg). The eviction was from the Remainder of Farm No 604 in the municipal area of the Winelands District Council, and Registration

Division Paarl, Province of the Western Cape, held under the Title Deed No. T12268/1965, commonly known as Nederburg Estate (the property).

[2] It is not in dispute that the appellant is the registered owner of the property. The appellant alleged that the first to fifth respondents are in unlawful occupation of the property in that it terminated, on lawful grounds, the residence of the first respondent. The first respondent was employed by the appellant as an irrigator from 26 July 1993 until his employment was terminated on 19 December 2011. The second to fifth respondents are the adult children of the first respondent under whom they claim residency on the property. The papers in this application were duly served on the Drakenstein Municipality, a local municipality as envisaged in s 2 of the Municipal Systems Act 32 of 2000, as well as on the Department of Rural Development and Land Reform and they both failed to respond.

[3] The background facts are that the appellant is a wine producing company which took the first respondent into its employment in July 1993, although a contract of employment was concluded only in December 2005. One of the conditions of employment was that the first respondent may reside on the property together with his family, inclusive of his children. It was a term of the contract of employment, read with the house rules that the first respondent and his family shall vacate the premises upon termination of employment or within one month of a notice to vacate. In terms of the farm rules which form part of the contract of employment, the employer reserved the right to exclude any employee from the premises who is found to be under the influence of alcohol or drugs, as well as removing such employee from the premises.

[4] It appears that the first respondent had a drinking problem. He had an alcohol dependency condition, as a result of which he voluntarily submitted himself to a rehabilitation treatment centre in October 2008, paid for by the appellant. Prior to his admission and at the appellant's insistence, the first respondent signed a Distell Assessment and Rehabilitation Agreement to be subjected to a random alcohol test before and after the treatment, to establish whether there was any alcohol present in his bloodstream. On Monday 18 December 2011 he tested positive to such test. As a result a disciplinary hearing was conducted. He pleaded guilty and was accordingly found guilty and his employment was terminated on 19 December 2011. He appealed internally, which appeal was dismissed. He referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) for unfair dismissal, however, he was advised by his union representative to withdraw the complaint. A settlement agreement was concluded incorporating the withdrawal. The first respondent was informed of the termination of his right of residence on 31 July 2013 and was notified to vacate the premises by 30 September 2013. The first respondent failed to vacate the premises, hence the application for eviction in terms of s 10(1)*(c)*, alternatively s10(3), read with s 8 and 9 of the Extension of Security of Tenure Act 62 of 1997 (ESTA).

[5] The court a quo dismissed the application on the basis that the appellant failed to demonstrate that the respondent had committed a fundamental breach of the relationship with the owner, which cannot be reasonably and practically restored. The court a quo went on to say 'unsubstantiated averments such as those contained in the founding affidavit cannot possibly justify an eviction based on s 10(3) of ESTA'. The appellant attacked the judgment of the court a quo on the basis that, it failed to properly consider the facts of this case and should have waited for the probation officer's report before deciding the matter.

The appellant contended further that a strong case was made out against the first respondent's adult children but the court a quo overlooked that. It also argued that the court a quo interpreted ESTA too restrictively.

[6] It is significant to note that the appellant's grounds of eviction were not only limited to the loss of employment of the first respondent. It also averred that the first respondent as well as his children's behaviour on the property had become increasingly intolerable. The appellant alleged that they harassed, abused and insulted the other innocent employees on the farm. They placed the other employees' safety at risk by threatening them with violence. Warning letters had been addressed to these children. Some of the lawful occupiers had lodged complaints with the farm manager. It is alleged that these children abused drugs and are forever under the influence of alcohol. Further, that the farm manager had been threatened with rape and violence (section 6(3)(*c*) of ESTA). One of the security guards had reported a *crimen injuria* case with the South African Police Services and is in possession of a MAS No: 685/11/2013. It was also recorded that one of the lawful occupiers is in possession of an interdict against the fifth respondent. The appellant averred that all these complaints have made life unbearable on the property. Some of the complainants deposed to affidavits in support of the application. The papers paint a grim picture of the unacceptable conduct of the second to fifth respondents. There are also allegations that the first respondent does not regularly reside on the farm anymore, but resides with what was referred to as his life partner on a neighbouring farm.

[7] As a result of its eviction application the appellant requested the court a quo to issue a notice requesting a probation officer's report in terms of s 9(3)

read with s 9(2)(*e*) of ESTA. The report had to deal with issues of suitable alternative accommodation, how an eviction will affect the constitutional rights of any affected person and also to point out any undue hardship which an eviction may cause the first respondent and his children. It is common cause that a probation officer's report was indeed requested, but was not before the court a quo when the matter was heard and considered. The report was apparently inadvertently sent to the magistrates' court, instead of the LCC.

[8] The appellant contended that the probation officer's report would have been of great assistance to the court a quo. It would have cleared the question of whether or not the first respondent still resided on the property. It was further submitted that the court a quo overlooked the confirmatory affidavit of the farm manager, Mr Faure, who specifically confirmed that at certain times the first respondent did not stay on the premises, but stayed with his life partner on a neighbouring farm. The appellant requested this court to admit the probation officer's report, which was admitted without demur. I must at this stage mention that the registrar of this court, at the request of the presiding Judge, wrote to the respondents to enquire if they had legal representation. As there was no response from them, the registrar engaged the Free State Bar Council which appointed Advocate Hendriks who prepared heads of argument for the respondents in a very short space of time. Advocate Hendriks' able efforts are commendable. This court found the report extremely useful and decisive, on the issue of whether the respondents had alternative accommodation upon eviction.

[9] There are conflicting decisions of the LCC on the question of whether or not a probation officer's report is mandatory in cases where ESTA is applicable. Gildenhuys J in *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simon &*

*another* [2000] 3 ALL SA 279 (LCC) was of the view that where an occupier voluntarily resigns in terms of s 10(1)(*d*) of the Act, the report is not necessary. Moloto AJ in *Valley Packers Co-operative Ltd v Dietloft & another* [2001] 2 ALL SA 30 (LCC) was of the view that *Westminster* was wrongly decided – he opined that the report must be requested in all eviction applications where s 9(2)(*c*) of ESTA is relied upon. I agree with the latter decision. Section 9(3) of ESTA makes it mandatory for the court to request a probation officer contemplated in s 1 of the Probation Services Act 116 of 1991 to submit a report within a reasonable period.

[10] In this case the probation officer's report confirmed that the first respondent 'is currently not employed and he is not staying on the farm as [he] is married to second wife. His first wife died six years ago. Only three of his children are staying on the farm, together occupying 4 roomed house on this farm'. The report further confirmed that neither the first respondent nor his children pay rent for the house, nor are they paying for electricity. He could not pay rent as he was unemployed and that none of his children are employed. It would appear that one of the children has moved out of the property. It seems from the report that the first respondent is more worried about his children than himself. In my view, had the court a quo had the benefit of the contents of the probation officer's report it would have decided to grant the eviction order, since the report is decisive.

[11] Consideration was given by this court to remit the matter to the court a quo to take into account the probation officer's report. We decided against remittal, as this court is in the same position as the court a quo would have been. This matter commenced in 2014 already and finality is required. It is in the

interests of justice that the matter be finalised to avoid incurring more costs. This court in *Magubane & another v Twin City Developers (Pty) Ltd & others* (891/16 [2017] 65 (30 May 2017) held that: 'As stated by authors D E Loggenrensberg and E Bertelsman *Erasmus*: *Superior Courts Practice* 2 ed vol 2 (loose-leaf) at A1-58, a court of appeal should in each case have regard to consideration of convenience. See also *Simaan v South African Pharmacy Board* 1982 (4) SA 62 (A) at 81A, where Viljoen JA stated: "The balance of convenience requires, that the present litigation should end in this court".

The court, in *Magubane*, went further to hold that:

'It should also be borne in mind that s 19 of the Superior Court Act 10 of 2013 endows this court with wide powers on the hearing of an appeal, including the power to "confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."'

[12] On the facts of this case, it is clear that granting an eviction order accommodates the rights, duties and legitimate interest of the appellant as owner together with a consideration of the protection of vulnerable occupiers, (first respondent), as provided for in ESTA. The first respondent will not be rendered homeless as he stays with his second wife (who had been referred to in the papers as 'life partner'). As for the adult, irresponsible and delinquent children they have no legal right to occupy the premises – their right existed while their father was still employed on the farm. They are a nuisance to the appellant and the lawful inhabitants on the property. Such behaviour cannot and should not be countenanced at all. Their behaviour resulted in the irretrievable break down of the relationship between the appellant and the first respondent.

[13] In the view that I take of this case, the factual discrepancy of the LCC of dealing with the matter without considering the probation officer's report, it is

unnecessary to deal with the interpretation of the legal threshold prescribed in s 10(1)(*c*) of ESTA. It is clear that the first respondent is not interested to remedy any fundamental breach which might have been committed and also not interested to restore any relationship with the appellant. Hence no effort was made by him to oppose the eviction application. He voluntarily withdrew, after advice, the complaint at the CCMA and settled the matter amicably. It follows that the eviction order should be granted. However, to the extent that the eviction may result in homelessness, certain suitable conditions need to be incorporated in the order.

[14] The following order is made.

1 The appeal is upheld with no order as to costs.

2 The order of the court a quo is set aside and replaced with the following:

'2.1 The first to fifth respondents are evicted from the property as described in paragraph 1 of this judgment.

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

2.3 To the extent necessary, the Drakenstein Municipality (the seventh respondent in the court a quo) is ordered to provide the first to the fifth respondents with temporary emergency accommodation within 60 days of the date of this order.

2.4 The Drakenstein Municipality is ordered to file a report on whether temporary emergency accommodation has been provided to the respondents to the Registrar of the Land Claims Court within 20 days from the date of the expiry of the 90 days referred to in paragraph 2.2 above.'

J B Z Shongwe

Acting Deputy President

Supreme Court of Appeal

Appearances

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| For the Appellant: | H S Havenga SC<br>Instructed by:<br>Cluver Markotter Incorporated, Stellenbosch;<br>McIntyre & Van Der Post Attorneys, Bloemfontein |
| For the Respondent: | C J Hendriks<br>Instructed by:<br>The Registrar of the Supreme Court of Appeal, Bloemfontein |