THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1162/17

In the matter between:

MZIMKHULU MARTIENS MONDE **APPELLANT**

and

JACOBUS JOHANNES VILJOEN NO **FIRST RESPONDENT**

JACOBUS JOHANNES VILJOEN **SECOND RESPONDENT**

BREEDE VALLEY MUNICIPALITY **THIRD RESPONDENT**

THE PROVINCIAL DIRECTOR OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM **FOURTH RESPONDENT**

Neutral citation: *Monde v Viljoen NO & others* (1162/17) [2018] ZASCA 138 (28 September 2018)

Coram: Maya P, Swain, Mocumie and Schippers JJA and Mothle AJA

Heard: 13 September 2018

Delivered: 28 September 2018

Summary: Land - Land reform - Extension of Security of Tenure Act 62 of 1997 (ESTA) - ss 8(1), 9(3) and 10(1)*(c)* - termination of right of residence - whether occupier lawfully evicted - probation officer's report prior to eviction order peremptory - termination of appellant's right of residence unlawful and invalid.

ORDER

On appeal from: Land Claims Court, Randburg (Rajab-Budlender AJ sitting as court of review in terms of s 19(3) of ESTA):

1 The appeal is upheld.

2 Paragraph 2 of the order of the Land Claims Court is set aside and replaced with the following:

'The order of the Worcester Magistrate's Court for the eviction of the first respondent from Millhurst Farm in De Doorns, Western Cape, is set aside and replaced with the following:

'The application is dismissed. There is no order as to costs.'

JUDGMENT

Schippers JA (Maya P, Swain and Mocumie JJA and Mothle AJA concurring):

[1] In November 2016 the Land Claims Court (LCC) confirmed an order made by the Worcester Magistrate's Court for the eviction of the appellant from Millhurst Farm in De Doorns, Western Cape (the farm), on automatic review, in terms of s 19(3) of the Extension of Security of Tenure Act 62 of 1997 (ESTA).[1] The LCC granted the appellant leave to appeal. On 15 December

[1] Section 19(3) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) provides, inter alia:
'Any order for eviction by a magistrate's court in terms of this Act, … shall be subject to automatic review by the Land Claims Court which may–
(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

2016, the appellant noted an appeal to the LCC against the eviction order. However, on 21 December 2016 the Constitutional Court delivered judgment in *Snyders*[2] in which it held that an eviction order under ESTA granted by the magistrate's court confirmed on automatic review by the LCC in terms of s 19(3) of ESTA, should be appealed to this court. Accordingly, on 22 December 2016 the appellant lodged with the LCC a notice of application for leave to appeal to this court against the confirmation of the eviction order. The central issue in the appeal is whether the first and second respondents satisfied the requirements for an eviction order in terms of s 9(2) of ESTA.

[2] The Stonefield Trust, of which the first respondent is a trustee, owns the farm. The second respondent Mr Jacobus Johannes Viljoen (Mr Viljoen) is the manager responsible for the day-to-day farming activities on the farm. Where appropriate, I refer to the first and second respondents as, 'the respondents'. In 2014 they applied to the Magistrate, Worcester, for an order evicting the appellant from the farm. The case for eviction, in sum, was this. The appellant was appointed as a general farm worker on 6 January 1995 and given a house to occupy on the farm. On 4 November 2011 he concluded a written employment contract with the first respondent (the employment contract). One of its essential terms was that he would only have accommodation for as long as he was employed by the first respondent. At all times it was the policy of the farm, as well as other farms in the area, that an employee would be entitled to reside on the farm only whilst he or she worked on the farm. The appellant's right of residence was thus derived exclusively from his employment.

[3] On 25 March 2013 the appellant was dismissed from his employment after he was found guilty on charges that he had been absent from work without

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(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.'

[2] *Snyders & others v De Jager & others* [2016] ZACC 55; 2017 (3) SA 545 (CC).

permission or leave, and failed to notify the employer of his absence. That day he was given a written notice of summary dismissal. The appellant did not refer his dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA), in terms of the Labour Relations Act 66 of 1995 (LRA), with the result that his right of residence terminated automatically upon termination of his employment. By letter dated 22 October 2013, the respondents' attorneys informed the appellant that his right of residence on the farm came to an end upon his dismissal, and he was given notice to vacate the house on the farm within 30 days.

[4] The appellant had a history of being absent from work without permission or leave, despite repeated oral and written warnings from January 2010 to February 2013 to desist from that conduct. This, inter alia, led to a fundamental breach of the relationship between him and Mr Viljoen. The appellant's failure to report for work had a disruptive effect on farming operations and placed more pressure on other workers who also had to do his work in addition to their own. The room that he occupies is needed for other workers whose interests carry greater weight.

[5] In his answering affidavit the appellant alleged that he was employed in 1988 and was given a single room on the farm in 1992, which he still occupied. He denied that he concluded the employment contract and said that it was never shown to him. He alleged that he always worked on the farm in terms of an oral employment contract; and that he did not waive or limit his right of residence. He also denied that the respondents adopted a policy that workers could reside on the farm only if they were employed on it.

[6] The appellant admitted that his employment gave rise to his right of residence, but denied that it was the only source of that right: he had been given

permission to live on the farm and enjoyed a right of residence on the ground of his family connection to his mother, who was also an occupier with a right of residence. The appellant conceded that his employment had been terminated, but denied that the dismissal was fair. He said that he had referred a dispute in this regard to the CCMA, but heard nothing further. He alleged that his right of residents had not been lawfully terminated. He also denied that there had been a fundamental breach of his relationship with Mr Viljoen.

[7] A recurring feature of the appellant's answer is a bald denial of the allegations in the founding affidavit. This, so the appellant's counsel submitted, gave rise to several disputes of fact, so that a final order could be granted only if the facts averred in the respondents' affidavits, which have been admitted by the appellant, together with the facts alleged by the latter, justified such order, in accordance with the rule in *Plascon-Evans*.[3] However, the appellant has ignored the exceptions to this general rule: a respondent's (the appellant in this instance) allegations may be rejected merely on the papers if they consist of bald or uncreditworthy denials, raise fictitious disputes of fact, or are palpably implausible, far-fetched or clearly untenable.[4]

[8] So for example, the appellant's bald allegations that he did not conclude the employment contract; that his dismissal was unlawful; and that there was no fundamental breach of the relationship between him and Mr Viljoen, raised fictitious disputes of fact, and were demonstrably implausible and untenable. The appellant's signature, which appeared on the employment contract, is identical to his signature on various documents in the record, including the written warnings issued to him and the notice of his summary dismissal. Apart from this, the evidence was that all employees of the farm (including the

[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-I.
[4] *Plascon-Evans* fn 2 at 635C; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55.

appellant) were assembled on 4 November 2011 when the employment contracts were explained to employees by a labour consultant and signed by the employees. The appellant laid no basis for the allegations that the decision to dismiss him was wrong or that he had referred the matter to the CCMA, the facts of which were peculiarly within his knowledge.[5]

[9] There is much to be said for the respondents' contention that the appellant's conduct had a negative impact on other occupiers on the farm and that they have been forced to follow a costly and drawn-out process to evict him. His employment record was poor. He has been living rent-free on the farm for more than five years whilst working and earning an income elsewhere. He made numerous promises to vacate the room which he occupies, but failed to do so. It is needed for other occupiers who are presently living in overcrowded conditions. In these circumstances, the appellant's claim that there had been no fundamental breach of the relationship with the landowner has no foundation, factual or otherwise. Indeed, in *Klaase*[6] the Constitutional Court held that in circumstances virtually identical to the present, there was no possibility that the relationship between the landowner and the occupier could be salvaged.

[10] However, ESTA contains clear provisions that must be complied with before an eviction order can be granted. It is to these requirements that I now turn. An applicant who seeks the eviction of an ESTA occupier is required to allege and prove all the elements of its cause of action.[7] The respondents had to show that the termination of the appellant's right of residence was both lawful, and just and equitable, as required by s 8 of ESTA. The relevant provisions read as follows:

'**Termination of right of residence**

[5] *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13.
[6] *Klaase & another v Van der Merwe NO & others* [2016] ZACC 17; 2016 (6) SA 131 (CC) para 43.
[7] *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) para 15.

(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to–

(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
(b) the conduct of the parties giving rise to the termination;
(c) the interests of the parties, including the competitive 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.

(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.

(3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.'

[11] The respondents' case was that the appellant's right of residence arose solely from the employment contract. That right terminated automatically upon termination of the contract, because the appellant was dismissed in accordance with the provisions of the LRA as contemplated in s 8(2) of ESTA; and he did not challenge his dismissal in terms of the LRA. Counsel for the respondents contended that only ss 8(2) and 8(3) found application in this matter, and that

Clause 17.1 of the employment contract 'state[d] unambiguously that the appellant's right of residence derived exclusively from the employer contract'.

[12] In *Snyders*,[8] the Constitutional Court held that an owner of land or farm manager who relies on s 8(2) of ESTA to justify the termination of an occupier's right of residence, bears the onus to prove that the occupier's employment was terminated for a fair reason related to the occupier's conduct as an employee and that it was effected in accordance with a fair procedure as required by the LRA.[9]

[13] There is no question that the termination of the appellant's employment was both substantively and procedurally fair. It is common ground that he received proper notice of the disciplinary hearing. He had been absent from work without leave or permission on 4, and 19-20 March 2013. Further, he had a history of delinquent conduct and received a number of warnings, both oral and written (including final written warnings), that his conduct was unacceptable and counter-productive to the employer's undertaking, and could lead to his dismissal. Contrary to the appellant's assertion, there is no evidence that he challenged his dismissal.

[14] The appellant's right of residence however, did not flow from the employment contract and clause 17.1 thereof does not support the respondents' contention. It provides:

'The employer shall grant to an employee who resides on the farm, accommodation of 1 (one) month after termination of the employment contract . . . .'[10] (Own translation.)

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[8] Footnote 2.
[9] *Snyders* fn 2 para 57.
[10] Clause 17.1 reads:
'Die werkgewer sal aan die werknemer wat op die plaas woonagtig is, vir 1 (een) maand akkommodasie verleen, na die beëindiging van die dienskontrak . . . .'

On its plain wording clause 17.1 means no more than this: in the case of an employee who lives on the farm, he or she must be given free accommodation for one month after termination of his or her employment contract.

[15] This interpretation is buttressed by the immediate context. The parties expressly excluded housing in clause 10 of the employment contract by drawing a line through that clause and initialling alongside it. So the parties intended that an employee's right of residence would not be derived from the employment contract. Clause 10 provided:

'**COMPENSATION**

…

Housing or food shall be provided to the employee for the period during which the employee is in the employ of the employer. The employer shall deduct 10% (ten percent) of the employee's salary for such benefit and only if the housing or food complies with the prescribed requirements as set out in the determination.'[11] (Own translation.)

[16] Further, the employment contract itself states that its conclusion after the employee's commencement of employment, does not negate any former period of service accumulated or existing benefits enjoyed by the appellant, nor could it.[12] Section 25 of ESTA provides, inter alia:

'**Legal status of agreements**

(1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of a court.

(2) A court shall have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act.'

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[11] Clause 10 provided:
'**VERGOEDING**
...
'Behuising of kos sal aan die werknemer voorsien word vir die tydperk wat die werknemer in diens van die werkgewer is. Die werkgewer sal 10% (tien persent) van die werknemer se salaris aftrek vir sodanige voordeel en slegs indien die behuising of kos voldoen aan die voorgeskrewe vereistes soos uiteengesit in die Vasstelling.'

[12] Clause 1.3 reads:
'Die ondertekening van hierdie ooreenkoms nadat die werknemer in diens getree het, negeer geen vorige tydperk van diens opgeloop of bestaande voordele voor die aangaan van die ooreenkoms nie. Die werknemer se datum van aanstelling is 06-01-1995.'

[17] The appellant claimed an existing benefit. He alleged that he had enjoyed a right of residence from the time that he lived with his mother on the farm, prior to the allocation of a house to him in 1995. The respondents denied that he initially exercised his right of residence in his mother's house. They contended that the appellant was not an occupier in his own right while he was living with his mother and that he only became such an occupier when he received express permission to live in his own house as head of the household. Stated differently, before 1995 there was no agreement between the respondents and the appellant that gave him a right to occupy the farm, and he was thus not an occupier under ESTA.

[18] The magistrate upheld the respondents' contention. On the authority of the LCC's decision in *Klaasen*,[13] she found that family members could never be occupiers because there was no legal nexus between them and the owner of the land. That finding was incorrect. The Magistrate disregarded the definition of 'occupier' in ESTA, as well as the provisions of ss 3(4) and 3(5) thereof. An occupier is defined 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 . . . . '

Sections 3(4) and 3(5) of ESTA provide:

'(4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.

(5) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge.'

[13] *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC).

[19] As was stated by this court in *Sterklewies*,[14] ESTA does not describe an occupier as a person occupying land in terms of an agreement or contract, but one occupying land with the consent of its owner. The approach in *Klaasen*,[15] that 'consent must originate from an agreement, or exist by operation of law' unnecessarily restricted the provisions of ESTA. Where persons claim protection under ESTA it suffices to show that the owner has consented to their occupation, regardless of whether that occupation arises from an agreement or has its source elsewhere.[16]

[20] *Sterklewies* was affirmed by the Constitutional Court in *Klaase*,[17] in which the meaning given to 'consent' by the LCC in *Klaasen*,[18] namely that 'the person concerned must be or must have been a party to a consent agreement with the owner of the land', was held to be an impermissible restriction of 'consent' as contemplated in ESTA. Further, the LCC's interpretation ignored the significance of tacit consent, with the result that many people who would otherwise qualify as occupiers would be excluded and evicted arbitrarily from land, without being afforded their constitutional guarantees and protection under ESTA.[19]

[21] What all of this shows is that the respondents did not establish that the appellant's right of residence flowed exclusively from the employment contract and, with the termination of the latter, that his right to occupy a room on the farm terminated. It is not their case that the appellant's right of residence had been terminated independently of the employment contract, with the result that they failed to make out a case for the appellant's eviction. In addition, there is

[14] *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga & others* [2012] ZASCA 77; 2012 (5) SA 392 (SCA) para 3.
[15] Footnote 11.
[16] *Sterklewies* fn 12 para 3.
[17] Footnote 6 para 56.
[18] Footnote 11.
[19] *Klaase* fn 6 paras 54-56.

no evidence to gainsay the appellant's claim that prior to the conclusion of the employment contract, he had consent to reside on the farm. Neither is there any evidence to rebut the presumptions in ss 3(4) and 3(5) that he resided on a farm with the respondents' consent and knowledge. On these grounds alone, the appeal must succeed.

[22] The respondents' claim that it has always been a policy that employees were entitled to live on the farm only whilst they were employed there does not assist them for the following reasons. The first is that their case was squarely founded on the employment contract. The second is that the employment contract itself is at odds with the alleged policy – the parties expressly excluded housing. And the third is that the respondents did not establish that the appellant was not an occupier under ESTA before the employment contract was concluded in 2011: s 25 of ESTA and clause 1.3 of the employment contract make it clear that the appellant's pre-existing rights (which includes the right of residence) were neither waived nor negated when he entered into the employment contract.

[23] It follows that the respondents failed to show that the termination of the appellant's right of residence was just and equitable as required in terms of s 8(1) of ESTA. In the result, the purported termination of the appellant's right of residence was unlawful and invalid.[20] And the order for his eviction as envisaged in s 9(2)*(a)* of ESTA, was incompetent. Section 9, in relevant part, provides:

'Limitation on eviction

(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(2) A court may make an order for the eviction of an occupier if–

(a) the occupier's right of residence has been terminated in terms of section 8 . . . .'

[20] *Snyders* fn 2 para 75.

[24] What remains is the challenge to the eviction order on the basis that it was granted without a probation officer's report, required in terms of s 9(3) of ESTA. Although it is not strictly necessary to decide this issue, it has been the subject of conflicting judgments of the LCC, and in the interests of clarity and certainty, we are obliged to pronounce upon it. Section 9(3) provides:

'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.'(Emphasis added.)

[25] Section 9(2)*(c)* of ESTA provides that a court may make an order for the eviction of an occupier if the conditions for an order for eviction in terms of s 10 or s 11 have been complied with. The respondents relied on the condition in s 10(1)*(c)* of ESTA: an order for the appellant's eviction was appropriate because he had committed a fundamental breach of the relationship between him and Mr Viljoen that was not practically possible to remedy.

[26] The clerk of the civil court had requested a probation officer's report in May and October 2014, and again in March 2016, but the report had not been furnished. Following the LCC's decision in *Theewaterskloof Holdings*[21] in which it held that s 9(3) did not require a probation officer's report before an eviction order could be made but simply that it be requested, the magistrate found that the report was not available within a reasonable time of its request,

[21] *Theewaterskloof Holdings (Edms) Bpk, Glaser Afdeling v Jacobs en andere* 2002 (3) SA 401 (LCC).

and decided the case without it. It appears that the holding in *Theewaterskloof Holdings* was motivated by long delays encountered before reports were provided.[22]

[27] The LCC has subsequently in *Cillie*[23] held that a probation officer's report was not a mere formality. It found that the issues in s 9(3) of ESTA that had to be addressed in the report were necessary to assist a court in deciding whether an eviction was just and equitable; that the importance of the report in an eviction could not be overemphasised; and that it ensured that the constitutional rights of those affected by eviction were not overlooked. Likewise, in *Drakenstein Municipality*,[24] the LCC noted that s 9(3) was cast in peremptory terms; that the court's ability to discharge its function was frustrated without a report by a probation officer; and that the absence of the report negatively affected the interests of occupiers, since the purpose of ESTA was to protect occupiers from unlawful eviction and where eviction was inevitable, to ameliorate its adverse impact.

[28] The respondents contended that the only peremptory requirement in s 9(3) of ESTA was the *request* of a probation officer's report, and that this court's finding in *Magubane*[25] that the failure of the LCC to consider a report by the probation officer before making an eviction order where such report is requested but not filed, would result in injustice as neither the court, landowners nor farmworkers have much control over how and when reports are produced. The court in *Magubane* held that the failure of the LCC to consider a probation

[22] *Theewaterskloof Holdings* fn 19 para 13.
[23] *Cillie NO & others v Volmoer & others* [2016] ZALCC 5 para 18.
[24] *Drakenstein Municipality v CJ Cillie en Seun (Pty) Ltd* [2016] ZALCC 9 para 15.
[25] *Magubane & another v Twin City Developers (Pty) Ltd & others* [2017] ZASCA 65 para 9.

officer's report before making an order for eviction, was a material misdirection.[26]

[29] The respondents are however mistaken. It is a settled rule that when interpreting legislation, what must be considered is the language used; the context in which the relevant provision appears; and the apparent purpose to which it is directed.[27] It is also settled that ESTA is a remedial legislation with its genesis in the Constitution.[28] Its purposes include protecting those who do not have secure tenure of land and are therefore vulnerable to unfair evictions that lead to great hardship, conflict and social instability; and regulating evictions in a fair manner, while recognising the right of landowners to apply for an eviction order in appropriate circumstances.[29]

[30] Consistent with the overall purpose of ESTA, s 9(3) forms part of provisions that impose limitations on eviction and prescribe the circumstances in which an eviction order may be made. The factors listed in 9(3)*(a)-(d)* that should be contained in the report by a probation officer, such as the availability of suitable alternative accommodation, the effect of an eviction order on constitutional rights including the rights of children, and any hardship which an eviction would cause, are highly relevant to the question whether an eviction order would be just and equitable. The former interpretation of the LCC that a court is entitled to proceed with an eviction application in a case where a probation officer's report is not filed within a reasonable time, rendered the provisions of s 9(3) nugatory: it could never have been the legislature's

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[26] *Magubane* fn 23 para 9. The court noted that the jurisprudence of the LCC that it was entitled to proceed with an eviction application if a probation officer's report was not filed within a reasonable period of time was correct, but that statement was *obiter*.

[27] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[28] *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 para 53.

[29] See the preamble to ESTA.

intention that an eviction order could be granted without the report. It follows that *Cillie*[30] and *Drakenstein Municipality*[31] were correctly decided.

[31] The following order is issued:

1 The appeal is upheld.

2 Paragraph 2 of the order of the Land Claims Court is set aside and replaced with the following:

'The order of the Worcester Magistrate's Court for the eviction of the first respondent from Millhurst Farm in De Doorns, Western Cape, is set aside and replaced with the following:

'The application is dismissed. There is no order as to costs.'

_____

A Schippers

Judge of Appeal

[30] Footnote 21.
[31] Footnote 22.

APPEARANCES

For Appellant:	P Hathorn
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