

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 14 May 1999
before **Bam P**

CASE NUMBER: LCC25/98

In the case of:

ANNA PRENTJIES AND OTHERS

Applicant

and

L VISAGIE

Respondent

JUDGMENT

BAM P:

[1] The applicants are a cluster of families who live on a portion of the Karise Farm, Alewynspoort (hereinafter referred to as “the farm”). Some have previously worked on the farm while others are relations to former workers; but the origins of three of them cannot be determined from the papers. All of them assert that they are occupiers as defined under the Extension of Security of Tenure Act, 62 of 1997 (hereinafter referred to as “the Act”). They contend that the respondent has, contrary to the provisions of the Act, evicted them by cutting off the supply of water and electricity to their places of abode.¹ Consequently, they claim relief in terms of section 14² of the Act and seek an order for the restoration of these services.

1 Section 1 of the Act defines “evict” as follows:

“... to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and ‘**eviction**’ has a corresponding meaning.”

2 The section reads in part as follows:

“14. Restoration of residence and use of land and payment of damages

- (1) A person who has been evicted contrary to the provisions of this Act may institute proceedings in a court for an order in terms of subsection (3).
 - (2) ...
 - (3) In proceedings in terms of subsection (1) or (2) the court may, subject to the conditions that it may impose, make an order-
 - (a) ...
 - (b) ...
 - (c) for the restoration of any services to which the person had a right in terms of section 6;
 - (d) ...
 - (e) ...
 - (f) ...
- ...”

(Section 6 is quoted in para [17] below).

[2] The respondent is the lessee of the farm in terms of an agreement of lease with the owner, Dr Thaning. The agreement of lease was signed on 1 May 1996 and the period of the lease was from that date until 30 April 2001.

[3] The application was brought initially as a matter of urgency due to a misapprehension that an alternative source of water supply from a neighbouring farm might be withdrawn at any time. All the same the matter was, by consent, albeit with criticism on respondent's part, pursued as an ordinary application.

[4] The respondent filed a notice of opposition to the application and then instituted a counter application in which he sought the eviction of all but six of the applicants from the land in question. He admitted that these six applicants (first, second, third, sixth, seventh and eighth applicants) were occupiers as defined but disputed that claim for the remainder. He further strongly denied that he was responsible for cutting off either the water or the electricity from all the applicants' places of abode. Accordingly he denied that he was under any legal obligation to make restoration and, in any case, there was insufficient water on the land for him to comply with that part of the claim.

[5] A single substantive affidavit by the first applicant was filed on behalf of all the applicants and only confirmatory affidavits by the others insofar as it related to each of them. All the averments pertaining to occupancy of all the applicants, except the first applicant herself and the five others,³ were contested by the respondent.

[6] I have carefully scrutinized all these averments and denials in respect of each applicant and have reached the conclusion that there are such serious and material factual disputes in respect of all of them that I am unable to decide their status on the papers. On the one hand, the founding affidavit on behalf of the applicants is lean on detail and on the other, the respondent's denials beg the question of how and when all these people, including the elderly, came to be living on the farm and exactly what the status of their spouses, children and grandchildren is.

3 See above para [4].

[7] In this regard, Mr Marais for the respondent, has urged me to find that, in terms of the *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁴ and the *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*⁵ cases, there is no real factual dispute but only one credible version being that of the respondent. I am not persuaded that this is the case. On the contrary, I am of the view that in each case there are two versions or perspectives each to be tested and verified by oral evidence and subjected to cross-examination. Let us take but one example, the fourth applicant stated in the founding affidavit in matter-of-fact terms as follows:

“The fourth applicant is 89 years old and lives on the property since 1983. Her late husband was a farm labourer employed by Mr Thaning. She also lives in a house supplied by Mr Thaning and has access to water and electricity. The fourth applicant’s husband died during 1985.”

That elicited a denial from the respondent in the following terms:

“39.1 Each and every allegation contained in this paragraph is denied. There is absolutely no record of the 4th Applicant ever being present on the farm or that her husband, who is alleged to have died during 1985, was employed by Mr Thaning.

39.2 Consequently, I state that the 4th Applicant at no stage had permission to be on the farm, and to the extent that she is not part of the families in respect of whom it was agreed with Dr Thaning that they may remain on the property, she has been validly given notice to vacate the property during May 1996.”

[8] The fact of the matter is that, assuming the fourth applicant to have been actually present and living on the farm despite there being no record to that effect, then the Court needs an explanation. At the same time it is expecting too much to find her to satisfy all the elements of being an occupier on the untested *ipse dedit* not of herself but of another. The mere fact that she was given a notice to vacate the property during May 1996 (before the Act commenced) does nor necessarily place her outside the scope of being an occupier.

[9] This dilemma presents itself in respect of all of the applicants whose status as occupiers is in dispute but I do not intend to deal with each applicant separately at this stage and accordingly will refer to oral evidence the whole issue pertaining to occupancy. Even if I were able to find all of them to be occupiers, I would still have to find that the respondent is responsible for their eviction

4 1984 (3) SA 623 (A).

5 1949 (3) SA 1155 (T).

(an allegation which respondent denies) since that was the premise from which the application is launched.

[10] The respondent vehemently disputes responsibility either for termination of the water supply or for the continuation of that termination. Now if the respondent did not have a role at all, let alone the sole or predominant role, in depriving the applicants “access to water which is linked to a right of residence” in terms of the Act, then the application against him must be dismissed as the pleadings presently stand.

[11] In these circumstances, not only would it be putting the cart before the horse to be analysing the complexities of who is or is not an occupier but it would also have been an exercise in futility if, at the end of the day, the respondent is yet under no legal obligation to make restoration in terms of the prayers in the notice of motion.

[12] I will accordingly deal now with the issue pertaining to the termination of the water supply and its continuation due to the supply’s insufficiency to meet the needs of some or all of the applicants. I will not deal with the question of the electricity supply since I find that the allegation that the respondent summarily discontinued it has not been substantiated and is a mere speculation on the part of the first applicant that is clearly contradicted *ex facie* the letter (exhibit “A”) by Mr Pittaway to Escom dated 28 May 1996. This letter was addressed on behalf of Dr Thaning and not the respondent and reads as follows:

“Please could you discontinue the supply to the above transformer immediately.”

I am also not persuaded that its deprivation or denial amounts to an “eviction”⁶ and there is no allegation in the papers that it was such a service as had been expressly or tacitly agreed upon, and on what terms, with either Dr Thaning or the respondent.⁷

6 See above n 1.

7 Section 6(1) reads:

“Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly”.

[13] I also cannot consider the respondent's counter application because clearly it comes into play only once I shall have made a finding that some or all of the disputed applicants are not occupiers. Since I am unable to make that finding, as stated in paragraph [8] above, it is unnecessary for me to deal with counsels' submissions in this regard such as whether this Court has the jurisdiction to entertain an application for eviction which is not in terms of the Act. I will therefore confine myself exclusively to the dispute concerning the supply of water which, it is common cause, is the central issue to the application.

[14] In this regard, the first applicant in her founding affidavit stated that shortly after the respondent became a tenant in 1996 he, *inter alia*, made it impossible for the applicants to make further use of the borehole water on the property which supplied the applicants.

[15] In challenging this particular allegation, counsel for the respondent, Mr Marais, first submitted what he termed a jurisdictional fact which placed the application outside the ambit of the Act. In as far as the water issue was concerned, he stated that where it is clear that deprivation of access to water is regarded as an eviction, such eviction must have occurred between 4 February 1997 and the commencement of the Act. It was common cause between the parties, he stated, that the alleged disconnection of the water even, upon the applicants' own version, occurred during 1996 thus placing it outside the time-frame prescribed by the Act.

[16] Mr Botha for the applicants sought to counter this argument by stating that the continued deprivation of water after 4 February 1997 is to be construed as an eviction as from that date, although the actual act of cutting off the supply may have occurred on an earlier date.

[17] I agree that the view expressed by Mr Botha is sound both in logic and in terms of the Act. Again I am of the view that section 6 of the Act puts the issue beyond doubt and entrenches the right of access to water. It reads as follows:

“6. Rights and duties of occupier

- (1) Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.

- (2) Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right-
- (a) . . .
 - (b) . . .
 - (c) . . .
 - (d) . . .
 - (e) not to be denied or deprived of access to water;
 - (f) . . .

....”

[18] The respondent further sketched the history of the farm in order to demonstrate that for almost five years before he took occupation, none of the applicants received any water from the boreholes. The first applicant nonetheless stuck to her allegations in her replying affidavit adding that the respondent had in fact instructed a certain employee to disconnect the pipe supplying the tenth applicant with water as well as the pipe supplying the other applicants with the water.

[19] There were many other irreconcilable points of detail that emerged as a result of the diverse and contradictory positions outlined in the above paragraph to which reference will be made later in the concluding paragraph of this judgment.

[20] Counsel on both sides agreed that there were factual disputes in the papers regarding the issue but made different submissions on how the Court should resolve it. Mr Botha, on behalf of the applicants, proposed that the only way the court could resolve the issue was to hear oral evidence and even to undertake an inspection *in loco* on the farm. Mr Marais, on behalf of the respondent, argued very strongly on the other hand, that I should forthwith dismiss the application on the basis, in his submission, of the inherent credibility of the respondent’s version as against the far-fetched, untenable and blatantly false version in the first applicant’s affidavit. He quoted the well known case of *Plascon-Evans*⁸ for this proposition.

8 See above n 3.

[21] As I pointed out during argument this Court has previously on several occasions applied the test set out in the *Plascon-Evans*⁹ case with the proviso that the Court would exercise its discretion depending on the circumstances of each case.¹⁰

[22] In the circumstances of this case, I am of the view that Mr Marais levelled some very sharp and accurate criticisms on the vagueness, brevity and even shoddiness in the manner in which the first applicant's allegations were presented. He stated for instance that there were no confirmatory affidavits when these were clearly necessary; no personal knowledge on the part of the first applicant in respect of some of her allegations and no specific responses to material allegations. I am also of the view that he succeeded in demonstrating that, in contrast, the version of the respondent was more cogently presented. I am, however, not ultimately persuaded that the truth can be culled entirely from the respondent's version to the total exclusion of the first applicant's version.

[23] After a careful comparison of the versions, I still need clarity and enlightenment on the following:

- (i) Was the applicants' water supply disconnected? If so, when, where and by whom?
- (ii) Were applicants denied access to water? If so, when, where and by whom?
- (iii) Is there sufficient water on the farm to serve the needs of the applicants? If so, where?
- (iv) The status of the applicants present and living on the farm other than those admitted to be occupiers by the respondent.

[22] For the reasons stated above, I make the following order:

9 See above n 3.

10 See, for example, *Dhladhla and Others v Erasmus* 1999 (1) SA 1065 (LCC) at 1071E-1072F and *De Jager & Sons v Kumalo* [1992] 2 All SA 629 (LCC) at 634f-635h.

- (a) Oral evidence is to be heard to determine all the questions listed in paragraph [21] above.
- (b) Such witnesses may be called by the parties whose evidence is relevant to such questions. The names and a brief summary of the evidence of any witness who has not given deposed to on affidavit in the case must be delivered at least five days before the hearing.
- (c) Costs of this application to be costs in the cause.

[23] The Registrar is directed to communicate with the parties to determine a date for the hearing of oral evidence in terms of the above order.

PRESIDENT F C BAM

Heard on: 14 May 1999

Handed down on: 27 October 1999

For the applicants:

J J Botha instructed by *Nico van Rensburg Associates*, Northcliff

For the respondent:

M Marais instructed by *Rossouws Attorneys*, Johannesburg