IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case Numbers LCC 21R/2014
MCC 2179/2013

In the matter between

ISAK BARON	First Appellant
DAVID BAILEY	Second Appellant
ERIC CUPIDO	Third Appellant
JONATHAN STOFFELS	Fourth Appellant
RICHARD FIGLAND	Fifth Appellant
ANTHONY MERRINGTON	Sixth Appellant
ANY OTHER PERSONS WHO ARE CURRENTLY RESIDING AT CLAYTILE JOOSTENBERG BRICK, HERCULES PILAAR ROAD. MULDERSVLEI WITH OR THROUGH THE ABOVE RESPONDENTS WHOSE NAME AND IDENTITIES ARE UNKNOWN TO APPLICANT	Seventh Appellant

and

CLAYTILE (PTY) LTD	First Respondent
CITY OF CAPE TOWN METROPOLITAN MUNICIPALITY	Second Respondent

JUDGMENT: 23 MARCH 2016

MEER AJP

[1] This appeal is concerned with the vexed question as to whether it is just and equitable to evict occupiers from private land under the Extension of Security of Tenure Act No 62 of 1997 ("the Act"), if the State is unable to provide them with alternative accommodation. The enquiry in essence, juxtaposes the constitutional obligation of the State to provide housing in terms of section 26 of the Constitution of the Republic of South Africa 108 of 1996 ("the Constitution") against the property rights of land owners and the tenure rights of occupiers under the Act.

[2] The Appellants appeal against an eviction order handed down by the Bellville Magistrates Court in February 2015, in terms whereof they were ordered to vacate the premises they occupy on the First Respondent's farm, eight months later in October 2015. Notwithstanding the non availability of alternative accommodation by the responsible municipality, the Second Respondent being the City of Cape Town Metropolitan Municipality being the City of Cape Town Metropolitan Municipality ("the Municipality"), or otherwise, the Court *a quo* held it was just and equitable that the Appellants be evicted. This was so, given that their rights of residence were lawfully terminated, that they had been provided with free accommodation, water and

electricity by the First Respondent ("Claytile") for over three years, that they were gainfully employed elsewhere and that Claytile was unable to accommodate its current workers as a consequence, to its obvious detriment.

[3] The details pertaining to the occupancy of the Appellants are fully set out in the judgment of the Court *a quo* and save for a few salient facts, it is not necessary to repeat these here. The Appellants, except for the Sixth Appellant who has regrettably passed on, are all occupiers who reside in workers' cottages on Farm 1676, Claytile Joostenberg Brick, Muldersvlei ("the farm"), Western Cape. The farm is owned by Claytile, who operates a brick manufacturing business from the premises. The Appellants are former employees of Claytile. In terms of their oral employment contracts with Claytile, the Appellants were allocated housing units on the farm which they were permitted to occupy only for the duration of their employment, and which they would have to vacate within thirty days of the termination of their employment contracts.

[4] The First to Third, Fifth and Sixth Appellants were occupiers on 4 February 1997 and accordingly section 10 of the Act is applicable to a consideration of their eviction. Section 11 has application to the Fourth Appellant who became an occupier after 4 February 1997.

[5] The employment of the First Appellant was terminated in December 2011, that of the Second Appellant in October 2009, the Third and Fourth Appellants' in December 2008 and that of the Sixth Appellant in October 2006. The terminations, which went unchallenged, were pursuant to disciplinary enquiries premised on misconduct on their part. The Fifth Appellant voluntarily resigned in March 2007. On 3 November 2012, Claytile gave the Appellants written notice to leave the farm by 8 December 2012. They failed to do so and continued in residence whilst gainfully employed in other entities close by.

[6] In June 2013, Claytile commenced an application for their eviction in the Bellville Magistrate's Court. In papers before the Court, the Appellants primarily took issue with the fairness of an eviction in the absence of alternative accommodation being available to them. They did not dispute that Claytile had complied with all other substantive and procedural requirements as specified at section 9 of the Act, precedent to the granting of an eviction order. The Appellants thus did not dispute that their employment and rights of residence were lawfully terminated in all other respects. The Municipality, with whom there has been engagement, indicated in the Court *a quo*, that it is not in a position to provide alternative accommodation due to a long waiting list and that emergency housing was also not available.

[7] In granting an eviction order and according the Appellants a period of eight months to vacate the premises by October 2014, the Magistrate found, with reference to section 10 (3) of the Act, that in comparing the respective parties' interests and hardship it was unjust and inequitable for the Appellants to continue residing on Claytile's property without giving any benefits to the landowner, and depriving its current employees of accommodation. He accordingly considered that it was just and equitable to grant the eviction order in the circumstances.

On appeal

[8] It is apparent from the above that the Respondents have continued to reside on the Claytile's property for some three years and three months since the termination of their residence and have resided on the property for considerably longer since the termination of their employment. They continue in residence whilst gainfully employed elsewhere, pay no rent and enjoy the benefits of free water and electricity. As a consequence, contrary to Claytile's employment policy, its current employees cannot be accommodated on the farm.

[9] Mr Njeza, for the Appellants, argued that the Court *a quo* erred in granting an eviction order in the absence of alternative accommodation being available by the Municipality. The eviction, he contended, was not just and equitable as it would render the Appellants homeless. He argued that the

comparable hardships did not favour the granting of the eviction order as the homelessness occasioned thereby, took precedence over Claytile's need to accommodate its current employees.

[10] Whilst the availability of alternative accommodation is undoubtedly an important consideration, it is, as was submitted by Mr Wilkin for Claytile, but one of the factors that a Court has regard to when deciding in the context of justice and equity whether to grant an eviction order under the Act. Section 10 (3) of the Act for example, which is applicable to all, save the Fourth Appellant, permits an eviction if suitable alternative accommodation is not available to an occupier within a period of nine months after the date of termination of his or her right of residence in circumstances such as the present, if it is just and equitable to do so, having regard to the efforts to obtain alternative accommodation and the respective interests and hardships of the parties. The Section states:

> ***"10. Order for eviction of person who was occupier on 4 February 1997***
>
> *(1) ...*
>
> *(2) ...*
>
> *(3) If—*
>
> *(a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;*

(b) the owner or person in charge provided the dwelling occupied by the occupier; and

(c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to –

(i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and

(ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted."

[11] Similarly, in terms of section 11 of the Act which is applicable to the Fourth Respondent, in deciding whether it is just and equitable to grant an order for eviction, suitable alternative accommodation is but one of the factors the Court shall have regard to. Section 11 (3) states as follows:

"(3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to-

(a) the period that the occupier has resided on the land in question;

(b) the fairness of the terms of any agreement between the parties;

(c) whether suitable alternative accommodation is available to the occupier;

(d) the reason for the proposed eviction; and

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

[12] In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and another* 2001 (4) SA 759 (E) at page 769 B-D, the following remarks concerning suitable alternative accommodation, that were made in the context of evictions under sections 4 (7) and 6 (3) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 , apply equally to evictions under the Act:

"Section 6(3) enjoins a court of law, when considering whether it is just and equitable to grant an eviction order, to have regard to the factors mentioned therein. The availability of suitable alternative accommodation or land is but one of the factors which has to be considered by the court. To interpret this section in such a manner that this one factor is elevated to a pre-condition for the granting of an eviction order would have far-reaching and chaotic consequences which could never have been contemplated by the Legislature. If this was in fact so, it would be open to any person to occupy land unlawfully in order to force an organ of State to provide him with suitable alternative land or accommodation."

[13] In similar vein, the Supreme Court of Appeal ("SCA") in *Baartman and others v Port Elizabeth Municipality* 2004 (1) SA (560) at paragraph 18 Mpati

DP significantly distinguished between evictions sought by landowners and organs of state:

> *"In my view, although it is not a precondition for the granting of an eviction order but rather one of the factors to be considered by a court, as was said in Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others 2001 (4) SA 759 (E) ([2001] 1 B All SA 381) at 769 (SA) and 387 (B All SA), the availability of suitable alternative land becomes the important factor in the instant case. This is because of the length of time the appellants have resided on the property and, perhaps more importantly, because the eviction order is not sought by the owners of the property but by an organ of State. The State is obliged, in terms of s 26 of the Constitution, to take legislative and other measures, within its available resources, to achieve the progressive realisation of the right which everyone has, namely to have access to adequate housing."*

[14] As is acknowledged above, it is the State and not private citizens that carries a Constitutional obligation, in terms of section 26 of the Constitution, to take measures to facilitate access to adequate housing. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* and others 2012(6) SA 294 (SCA) the Court considered the ability of the State, as opposed to a private person, to obtain an eviction order, in the absence of alternative accommodation being available. Wallis JA at paragraphs 16 to 18 stated:

> *"[16] The issue of the availability of alternative accommodation is more difficult in the context of an eviction at the instance of an owner of property that is not an organ*

of state. There another constitutionally protected right, the right to property, comes into play...

[17] That situation differs from the case where an organ of state seeks the eviction. In such a case it is almost always the body responsible for providing alternative accommodation. The majority of cases where an organ of state asks for an eviction order will involve departments at various levels of government, that are either themselves responsible for the provision of housing or, if not, are nonetheless closely linked to departments that do bear that responsibility. In those circumstances to link the availability of alternative land or accommodation to the ability to obtain an eviction order is relatively straight forward. It will generally only be just and equitable to grant an eviction order at the instance of one arm of the state, if the related arm of the state bearing the obligation to attend to the housing needs of the population is able and willing to address the consequences of that eviction by ensuring that alternative land or accommodation is available to those evicted. Conversely eviction will ordinarily not be just and equitable in that situation if alternative land or accommodation is not made available.

[18] The position is otherwise when the party seeking the eviction is a private person or entity bearing no constitutional obligation to provide housing. The Constitutional Court has said that private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupiers. That approach makes it difficult to see on what basis the availability of alternative land or accommodation bears on the question whether an eviction order should be granted, as opposed to the

date of eviction and the conditions attaching to such an order. One can readily appreciate that the date of eviction may be more immediate if alternative accommodation is available, either because the circumstances of the occupiers are such that they can arrange such accommodation themselves, or because the local authority has in place appropriate emergency or alternative accommodation. Conversely, justice and equity may require the date of implementation of an eviction order to be delayed if alternative accommodation is not immediately available. It is, however, difficult to see on what basis it affects the question whether it is just and equitable to make such an order. Perhaps, in a case where the occupiers would be entitled to a lengthy period of notice before being required to vacate, the unavailability of alternative land or accommodation might operate as a factor to persuade the court that the issue of an eviction order, at the stage that the application came before it, would not be just and equitable, but such cases are likely to be rare."

[15] Footnote 23 of the judgment significantly states:

"If the landowner had no immediate or even medium-term need to use the property and it would simply be sterilised by an eviction order, the court could legitimately hold the view that it was not just and equitable at that time to grant an eviction order. That would be reinforced by a lack of availability of alternative land."

That is not the situation in the instant case where Claytile very clearly has an immediate need to use the property to house its employees.

[16] Similarly, this Court, per Gildenhuys J stated in *Theewaterskloof Holdings (Edms) Bpk, Glaser Afdeling v Jacobs en Andere* 2002 (3) SA 401 (LCC) paragraph 18:

> *"Wat die posisie met betrekking tot alternatiewe akkomodasie ookal mag wees, dit kan nie van die applikant verwag word om die respondente onbepaald op sy plaas te huisves nie. Die reg op behuising vervat in art 26 van die Konstitusie is nie gemeenregtelik of ingevolge die Konstitusie teen indiwiduele grondeienaars afdwingbaar nie."*

[17] Finally, I note that the allegations by the Appellants in their opposing papers that they would be rendered homeless in the event of their evictions are, as is categorized by the First Respondent, bald allegations unsubstantiated by evidence. The Appellants moreover did not indicate, as is required at section 10 (3) of the Act, what substantive steps they took to source alternative accommodation in the three years since the termination of their right of occupation in November 2012.

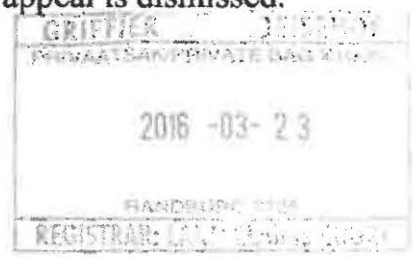
[18] I agree with the First Respondent that Claytile has been exceedingly generous towards the Appellants over the years, providing them with free housing, water and electricity for a long time after the lawful termination of their employment and rights of residence, notwithstanding that the terminations flowed from the Appellants' misconduct. In short, it can be said that Claytile

has shouldered the State's responsibility to house the Appellants for many years, and for long enough , and to its detriment and that of its current employees. In balancing the respective interests and hardships, the Magistrate, in my view, correctly concluded that an eviction would be just and equitable in all the circumstances.

[19] In view of all of the above, the Appellants' argument that the Court *a quo* erred in granting an eviction order in the absence of alternative accommodation being available, cannot be sustained. especially given Claytile's status as a private owner with a right to property, The appeal cannot therefore succeed. In keeping with this Court's practice not to award costs in the absence of special circumstances, which, in my view, do not pertain in this matter, I make no order as to costs.

[19] I accordingly grant the following order:

1. The appeal is dismissed.



Y S MEER
Acting Judge President

I agree and it is so ordered.

Z CARELSE
Judge