IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC47/2023

Magistrate's Court Case No: 2207/2021

Before: Honourable Meer AJP and Spilg J

Heard on: 2 November 2023

Delivered on: 29 January 2024

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

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DATE SIGNATURE

In the matter between:

BOPLAAS LANDGOED 1743 (PTY) LTD
(REGISTRATION NUMBER: 2007/030873/07) First Appellant

FRANS JACOBUS VAN DER MERWE
(ID NUMBER: 6[…]) Second Appellant

and

HAROLD VAN DER HANSE First Respondent
(ID: 8[…])

ELLENETTE VAN DER HANSE Second Respondent
(ID: 7[…])

AND ALL OTHER PERSONS RESIDING
WITH OR UNDER THE FIRST TO
SECOND RESPONDENTS IN THE PREMISES
ON DU CAP FARM, PAARL Third Respondent

DRAKENSTEIN MUNICIPALITY Fourth Respondent

PROVINCIAL DIRECTOR OF THE
DEPARTMENT OF LAND AND RURAL
DEVELOPMENT Fifth Respondent

And in the matter between:

CASE NO: LCC48/2023

Magistrate's Court Case No: 2208/2021

BOPLAAS LANDGOED 1743 (PTY) LTD
(REGISTRATION NUMBER: 2007/030873/07) First
Appellant

FRANS JACOBUS VAN DER MERWE
(ID NUMBER: 6[…]) Second
Appellant

and

SARA FORTUIN First
Respondent
(ID: 7[…])

HENDRIK TERBLANCHE Second Respondent
(ID: 7[…])

AND ALL OTHER PERSONS RESIDING
WITH OR UNDER THE FIRST TO
SECOND RESPONDENTS IN THE PREMISES
ON DU CAP FARM, PAARL Third Respondent

DRAKENSTEIN MUNICIPALITY Fourth Respondent

PROVINCIAL DIRECTOR OF THE DEPARTMENT OF LAND AND RURAL DEVELOPMENT Fifth Respondent

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JUDGMENT

MEER, AJP

[1] This judgment considers two appeals which were heard together (in cases LCC47/2023 and LCC48/2023), as they pertain to the eviction of the Respondents in both matters from the same farm in Paarl owned by the same owner. The facts and circumstances pertaining to the Respondents' residence on the farm and the applications for their eviction in both cases are virtually the same as appears below. In both matters the applications for the eviction of the Respondents was refused in the Paarl Magistrates Court on 30 January 2023, on the basis that it would not be just and equitable to grant the evictions.

[2] The First Appellant, Bo-Plaas Landgoed 1743 (Pty) Ltd is the registered owner of the farm commonly known as Du Cap, being Portion 2 of the farm Watervliet Estate No:1224, Drakenstein Municipality, Division Paarl, Western Cape Province ("the farm"). The Second Applicant is the person in charge of the farming activities and human resources on the farm and is also a director of the First Applicant.

Respondents in LCC 47/2023

[3] The First Respondent is Herold van der Hanse who originally came to reside on the farm with his parents in 1992. The Second Respondent is his wife. She commenced residing with the First Respondent and his parents during 2000 in their

family home. During 2010 the First and Second Respondents moved from the family home to House No 62 where they have been living ever since.

Respondents in LCC 48/2023

[4] The Respondents in LCC48/2023, came to reside on the farm during 1982, with their parents. Both Respondents were employed by the erstwhile owner of the farm when they were 12 and 14 years old respectively. During 2002, the Respondents married but continued to reside in a house with the Second Respondent's parents. During 2011, they took occupation of House No.52. It is from this house that their eviction is sought. The First Respondent is unemployed. The Second Respondent is employed as a causal worker. He is not employed on the farm.

[5] The Respondents were employed by the previous owner of the farm. The First Applicant purchased the farm in 2016, and upon doing so provided all occupiers residing on the farm, including the Respondents with an opportunity to apply for employment. The Respondents did not apply for employment because they were employed as seasonal workers on a nearby farm at the time.

[6] The Second Applicant's founding affidavit states that it is an accepted practice on farms in the area that employees enjoy a right of residence by virtue of their employment. This is not denied. Continued residence by the Respondents who are not employees is prejudicial to the Applicants as housing cannot be allocated to permanent employees. This too is not denied.

[7] In the months preceding the eviction applications, the Appellants embarked on a mediation process over a period of six months from August 2020 to January 2021 to secure the amicable eviction of the Respondents. The answering affidavit of the First Respondent in LCC 47/2023 states that during this process the Second Applicant did not give the Respondents the option of obtaining employment in order to continue residing on the farm. In reply the First Appellant avers that the Respondents have never applied for employment so as to possibly continue their residence on the farm on the basis of a permanent employment relationship with the

Appellants. At the hearing of the appeal we were informed by Mr Montzinger for the Appellants, that he was instructed that there were currently no employment vacancies to accommodate the Respondents.

[8] On 3 August 2020, the Respondents informed the mediator conducting the aforementioned mediation process, that they were willing to vacate the premises voluntarily if the First Applicant were to provide them with Wendy houses. The First Appellant agreed and encouraged the Respondents to find vacant plots via the Fourth Respondent, the Drakenstein municipality upon which the Wendy houses could be built. Three months passed and the Respondents did not furnish the Appellants with any feedback. A notice was delivered to the First Respondent in LCC 47/2023 on 16 November 2020, requesting him to confirm whether he had acquired a vacant plot within ten days. This did not occur. Nor did the other Respondents pursue the Wendy house option, it would appear. The Respondents approached Democratic Alliance Council member, Mr Kroutz, to represent them in further discussions.

[9] A meeting was held between the Appellants' attorneys and Mr Kroutz, on 23 November 2021 at which the possible Wendy house relocation was discussed but not resolved.

[10] A further meeting was convened between the Drakenstein Municipality's Housing officials, the Appellants' attorneys and Mr Kroutz. Alternative options to an eviction application were considered at the meeting. Once again, there was no resolution. The founding affidavit notes that due to the Respondents' unwillingness to participate in an inclusive mediation process, no feedback was provided by the respondents or Mr Kroutz enabling an amicable resolution. Consequently, formal steps for the eviction of the Respondents commenced.

[11] A notice to make representations as envisaged in section 8(1)(e) of ESTA, was served on the Respondents, on 4 February 2021. The Respondents did not respond to the notice. Nor did they advance any reasons orally or in writing why their rights of residence should not be terminated. As a consequence, a notice to terminate their right of residence was served on the Respondents on 18 March 2021.

The notice called upon them once again to provide reasons why the Appellants should not proceed with an application for their eviction. On 9 April 2021 a notice was served on the Respondents requiring them to vacate the farm within 30 days. When this did not occur the appellants commenced with the eviction application.

[12] In refusing the eviction application the court *a quo* appears to have based its decision solely on the question of the availability of suitable alternative accommodation. It found there to be none notwithstanding a comprehensive report from the Fourth Respondent about the options for alternative accommodation. Of concern is the fact that the Court *a quo* relied on photographs attached to the Respondents' heads of argument which had not been part of the pleadings and evidence. Furthermore, there was disquietingly no attempt by the Court *a quo* to consider whether the mandatory requirements for an eviction as set out in section 9 of ESTA had been complied with. The section states as follows:

> ***"9. 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;*
>
> *(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, 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."

[13] I now proceed to perform the exercise which the court should have undertaken.

Compliance with section 9(2)(a) of ESTA:

[14] As the Respondents were occupiers by consent, their right of residence could only be terminated having regard to the factors set out at section 8(1) of ESTA

"8. Termination of right of residence

(1)Subject to the provisions of this section, an occupier's right of residence maybe 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 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."

[15] With regard to section 8(1)(a) there was no agreement for the Respondents' continued residence on the farm. It is recalled that in 2016 the Respondents were given the option to continue residing on the farm if they were to be employed by the Appellants, an option which they rejected. Given the policy of the Appellants to provide accommodation for employees only, they required the Respondents to vacate the dwellings they occupied so that these could be available to other employees.

[16] With regard to section 8(1)(b), it is common cause that the Appellants sought to engage with the Respondents in an attempt to resolve the matter. The Respondents suggested a Wendy house solution, but it would appear, did not take the matter any further.

[17] In respect of the factor set out at section 8(1)(c) and comparing the interests of the parties, in must be borne in mind that the Respondents have been living since 2016 on the farm rent free. This is prejudicial to the Appellants who cannot house employees in the premises the respondents occupy. The hardship to the Respondents should they be evicted is that they will be deprived of the accommodation they currently enjoy. They are however on a housing waiting list and could be housed in a housing project still to be completed, or emergency housing, as referred to in the Fourth Respondent's report referred to below.

[18] In respect of section 8(1)(d), there was no reasonable expectation of the renewal of the consent to reside.

[19] In respect of section 8(1)(e), the Respondents were given effective opportunities to make representations in the forms of mediation and meetings before the decision was made to terminate their right of residence.

Compliance with section 9(2)(b):

[20] The respondents have not vacated the land within the period of notice given by the appellants.

Compliance with section 9(2)(c):

[21] Section 10 is applicable to the First Respondent in LCC47/2023 and the Respondents in LCC48/2023 as they came to live on the farm before 1997. The section states:

Order for eviction of person who was occupier on 4 February 1997

"10. *(1) An order for the eviction of a person who was an occupier on 4 February 1997*

may be granted if—

(a) the occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;

(b) the owner or person in charge has complied with the terms of any agreement

pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar months' notice in writing to do so;

(c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or

(d) the occupier—

(i) is or was an employee whose right of residence arises solely from that

employment; and

(ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act."

[22] Section 10(1)(a)-(d) is not applicable to their circumstances. However, section 10(2) and (3) is of relevance dealing as they do with suitable alternative accommodation. I am therefore required to consider the availability thereof.

[23] Section 11 of ESTA is applicable to the Second Respondent in LCC47/2023 as she became an occupier after 1997. This section states:

"11. Order for eviction of person who becomes occupier after 4 February 1997

(1) If it was an express, material, and fair term of the consent granted to an occupier to reside on land, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.

(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.

(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;

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

[24] The factors for consideration in section 11 mirror the factors set out at section 8(1) which I have considered above, save that section 11(3) specifically requires a court to consider whether suitable alternative accommodation is available. A comprehensive report dated 17 February 2022 on alternative accommodation and emergency housing by the Fourth Respondent Municipality indicated that the Respondents have been registered on the Municipality's housing demand data base since 2009 and have been listed as possible beneficiaries for Phase 2 of the Vlakkeland Housing project ("Vlakkeland Project") which will be completed over a 3 to 5-year period. The report as well as a further report of 27 July 2022 also indicated that emergency accommodation would be available at Schoongezicht.

[25] The court *a quo* as aforementioned accepted on the basis of photographs which were not part of the evidence but attached to the Respondents' heads of argument, that such emergency accommodation was in essence not fit for human habitation and unsanitary. At the hearing of the Appeal we directed the Fourth Respondent to deliver an updated supplementary report by 14 December 2023 to address *inter alia* any concerns regarding the availability of access to water, sanitation and electricity as well as safety for human habitation.

[26] We are grateful to the Fourth Respondent for filing an updated report timeously. The report indicates that emergency accommodation in Phase 4 Schoongezicht will be available by mid to end February 2024. The report states that Schoongezicht is not situated next to a dumpsite as alleged by the Respondents. The Municipality addresses the problem of people dumping refuse in an area not meant for refuse. There are operational toilets with doors to provide for privacy. The structures for emergency accommodation are temporary and provide basic protection against the elements. They are in line with the guidelines on minimum specifications for emergency shelter. Public transport is available.

[27] In *Occupiers of erven 87 and 8 Berea v Christiaan Frederic De Wet N.O*[1] at paras 61-62 the Court held that once it is established that there is a risk of homelessness, the duty of a municipality to provide temporary emergency accommodation is triggered. Such duty in the face of the Respondent's professed homelessness has been triggered and responded to.

[28] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*[2] it was held that where the eviction of occupiers is linked to the provision of emergency accommodation by the Municipality, the eviction of the occupiers is just and equitable. That in my view is the situation in the instant case.

[29] I am of the view that in an assessment of the factors set out at section 8(1) together with the factors set out at sections 10 (2), 10(3) and 11(3), it would be just and equitable to grant an order for the eviction of the Respondents who have been living at the Appellants' expense on the premises since 2014; who have rejected the offer of employment; who work elsewhere; and for whom emergency accommodation is available. I am however also of the view that emergency housing should be resorted to as a last resort in the instant case given that the Respondents have lived on the farm for decades, some of them since childhood. As that their names are on the housing list it would be preferable if they were relocated to Phase 2 of the Vlakkeland Housing Project, which, on a three-year projection of the Municipality should be completed by February 2025.

[30] The Appellants have submitted that an eviction order giving the Respondents 6 months to vacate would be just and equitable. In my view justice and equity in all the circumstances would be better served if a further 6 months were added to the eviction date so that hopefully the Respondents could relocate once only, and to the Vlakkeland Project. Justice and equity would also in my view be served if the Respondents could commence paying an affordable rental to be negotiated if possible according to their means for the remaining duration of their occupancy on

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[1] *Occupiers of erven 87 and 8 Berea v Christiaan Frederic De Wet N.O* .2017 (5) SA 346 CC

[2] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA104 CC

the farm. Should the Vlakkeland Project not be completed by the end of February 2025, it would be just and equitable for the Respondents at that stage to move to the emergency housing at Schhongezicht.

[31] The eviction of the Respondents will thus be rendered just and equitable if it is linked to the provision of alternative and emergency accommodation, by the Municipality. The order that I intend making is of that ilk and will give the Municipality reasonable time to arrange housing at the Vlakkeland Project and emergency accommodation in the event of that Project not being completed timeously. The date of eviction will be linked to a date on which the Municipality has to provide housing at Vlakkeland and thereafter emergency housing should such be needed. Such date will precede the date of eviction so that the Respondents are assured of accommodation and can make suitable arrangements for their relocation. The Municipality is urged to take all steps necessary to ensure that the Vlakkeland Project is completed timeously.

[32] In keeping with this Court's practice not to grant cost orders in matters of this nature, I intend making no order as to costs.

[33] In the circumstances the appeal succeeds. The order of the court *a quo* is substituted with the following order:

1. The Respondents shall vacate the dwellings they occupy on the Appellants' farm, Du Cap in Paarl ("the farm"") by no later than 28 February 2025.
2. In the event of the Respondents failing to vacate the dwellings on 28 February 2025, the Sheriff for the area is authorized to secure their eviction on 1 March 2025.
3. The Drakenstein Municipalities must provide the Respondents with accommodation at Phase 2 of the Vlakkeland Housing Project on or before 15 February 2025, should such project be completed by that date, and provided the Respondents are still on the farm and have not vacated it.
4. Should Phase 2 of the Vlakkeland Housing Project not be completed by 15 February 2025, the Drakenstein Municipality must provide the Respondents

with emergency housing at Schoongezicht until such time as Phase 2 of the Vlakkeland Housing Project is completed, provided the Respondents are still on the farm and have not vacated it. Thereafter the Drakenstein Municipality must provide the Respondents with accommodation at Phase 2 of the Vlakkeland Housing Project immediately upon completion of such Project.

5. There is no order as to costs.

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Y S MEER
Acting Judge President
Land Claims Court

I agree.

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B SPILG
Judge
Land Claims Court

APPEARANCES:

For the Appellants:	Adv. A Montzinger ***Instructed by:*** Otto Theron Attorneys Inc.
For the First and Second Respondents:	T J Mgengwana Maguga Attorneys Inc.