



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 641/2023

In the matter between:

GOEDVERWACHTING FARM (PTY) LTD

APPELLANT

and

ADRIAAN JOHANNES ROUX

FIRST RESPONDENT

ANY AND ALL UNLAWFUL

SECOND RESPONDENT

OCCUPIERS OF THE PROPERTY

THE CITY OF JOHANNESBURG

THIRD RESPONDENT

METROPOLITAN MUNICIPALITY

MINISTER OF AGRICULTURE

FOURTH RESPONDENT

AND LAND AFFAIRS

Neutral citation: *Goedverwaching Farm (Pty) Ltd v Roux and Others* (641/2023) [2024]
ZASCA 83 (31 May 2024)

Coram: NICHOLLS, MEYER and MATOJANE JJA and COPPIN and MBHELE
AJJA

Heard: 06 May 2024

Delivered: 31 May 2024

Summary: Land tenure – Extension of Security of Tenure Act 62 of 1997 – whether the respondents were occupiers as defined – no evidence of commercial farming on the land – role of the probation report – impermissible for court to make factual findings on basis of the probation officer’s report on matters which were not raised in the pleadings.

ORDER

On appeal from: Land Claims Court, Randburg (Flatela J, sitting as a court of first instance):

1. The appeal is upheld.
2. The order of the Land Claims Court is set aside and substituted with the following:
 1. The first and second respondents are to be evicted from portion 17 of the farm Goedverwachting, number 442, Registration Division IR, Gauteng Province on or before 31 July 2024.
 2. The Sheriff of the Court, together with the assistance of the South African Police Services, if necessary, is authorised to execute the eviction proceedings against the first and second respondents should the respondents fail to vacate the property by 1 August 2024.'
3. There is no order as to costs.

JUDGMENT

Nicholls JA (Meyer and Matojane JJA and Coppin and Mbhele AJJA concurring):

[1] This is an appeal against a decision of the Land Claims Court (LCC) which dismissed an application for eviction in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The appellant is Goedverwachting Farm (Pty) Ltd (Goedverwachting), the registered owner of portion 17 of the farm Goedverwachting, number 442, Registration Division IR, Gauteng Province (the farm). The first respondent is Adriaan Johannes Roux (Mr Roux) and the second respondent is all those persons who occupy the farm through Mr Roux. The third respondent is the City of Johannesburg Metropolitan Municipality and the fourth is the Minister of Agriculture and Land Affairs. No relief is sought against the third and fourth respondents. Mr Roux and those occupying through

him will be referred to as the respondents. This appeal is with the leave of the LCC.

[2] The issue in this appeal is one of jurisdiction, namely whether Mr Roux falls within the definition of an 'occupier' in terms of ESTA. If not, the LCC does not have the necessary jurisdiction. An 'occupier' is defined in terms of s 1 of ESTA as follows:

"occupier" means a person residing on land which belongs to another person, and who on 4 February 1997 or thereafter, had consent or another right in law to do so, but excluding—

(a) . . .

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family;

and

(c) . . .'

[3] It is not disputed that the farm in question is agricultural land and that at some stage, Mr Roux had consent to occupy the farm. The narrow question for determination is whether commercial farming was conducted on the farm, and if so, whether there were persons other than Mr Roux and his family members employed on the farm. Subsection (b) of the definition thus contains an exclusion from the definition of occupier and an inclusion in prescribed circumstances.

[4] The LCC, based on a probation officer's report in terms of s 9(5) of the Act (the report), found that Mr Roux was excluded from the definition of occupier because he was conducting commercial farming on the land, as envisaged in s (1)(b) of the definition of occupier. It accordingly held that the LCC did not have the jurisdiction to determine the eviction. The court did not deal with the inclusionary aspect at all, namely whether Mr Roux worked the land himself and employed only family members. That commercial farming was taking place is denied by Goedverwaching, who argue that this was not justified on the facts before court. Moreover, this was not an issue in dispute between the parties, or pleaded by them.

[5] The respondents' occupancy is not in dispute. Mr Roux and all those occupying

through him have been residing on the property since 2017, initially with the consent of Barend Frederik Keet (Mr Keet), the previous owner. The applicant states that the respondents had a 'temporally limited consent to occupy the property' afforded to them by Mr Keet, which was properly terminated. According to Mr Keet, prior to the property being sold to Goedverwachting, he was approached by members of Deneys Swiss Dairy (Pty) Ltd (Deneys) who expressed an intention to purchase the property and run a dairy business on the land. Pursuant to the proposed purchase the respondents were afforded a conditional right of tenancy on condition that the agreed purchase price was paid on the agreed terms. Deneys, according to Mr Keet, breached the purchase agreement and any right it had to the tenancy of the property was terminated. The agreement of sale was cancelled and the property thereafter sold to Goedverwachting.

[6] Correspondence between Mr Keet's attorneys and Mr Roux bears this out. A letter dated 5 June 2017, in which reference was made to a previous letter dated 11 May 2017, was served personally on Mr Roux on 14 June 2017. It refers to the breach of the sale agreement and informs Mr Roux and Ms McGovern of the immediate cancellation of the contract and their concomitant obligation to vacate the premises. Two years later on 14 June 2019, another letter was sent to Mr Roux by Mr Keet's attorney stating that since the cancellation of the sale agreement in 2017, the respondents had been in unlawful occupation and had paid no occupational rental. Mr Roux was invited to a roundtable conference and to settle the matter, failing which Mr Keet would institute legal proceedings for eviction. It appears that the respondents did not attend any meeting.

[7] The property was then sold by Mr Keet to Goedverwachting on 9 December 2020 with transfer taking place on 24 June 2021. The Deed of Transfer registered in the Deeds Office as T41994/2021 is proof of Goedverwachting's ownership of the farm. Still, the respondents refused to vacate the property. This resulted in a notice in terms of s 8¹ of

¹ Section 8(1) of ESTA provides as follows:

'8 Termination of right of residence

(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;

ESTA being dispatched to the respondents. Section 8 of ESTA provides that an occupier's right of residence may be terminated if it is just and equitable. It then sets out factors to be taken into consideration in determining this. Despite receiving the notice, no response was forthcoming from the respondents.

[8] The present eviction application was launched on 15 September 2022 in terms of s 9² of ESTA on the basis that the statutory requirements of s 8 had been complied with and that the consent to occupy had been properly terminated. It is not disputed that Mr Roux had alternative accommodation in the form of a small holding in the Free State. It was alleged that his continued occupation of the farm had resulted in the deterioration and gradual degradation of the property. Attached to the papers are various aerial photographs which depict a decrepit-looking farmhouse with animals such as donkeys, chickens and goats freely roaming on the property. These photographs had to be taken utilising a drone and a helicopter as the respondents had refused representatives of

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- (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.'

² Section 9 of ESTA provides 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 the Court issued under this Act.
- (2) The 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 Rural Development and Land Reform, 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 the 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 Rural Development and Land Reform 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.
- (3) ...'

Goedverwachting any access to the farm. In addition, it was stated that Goedverwachting, which was to have operated a cattle farming business, was losing substantial sums of money by the continued occupation of the property by the respondents.

[9] Preempting the defence of the respondents that their entitlement to the land was by virtue of their early occupation of the land as Khoi and San people, attached to the founding affidavit of the appellant is a document purporting to be an aboriginal title of the Gona-Hesse !Khwe Royal Kingdom officially endorsed by King Gqona Cornelius Botha (Mr Botha). A notice of the Kingdom declares that Mr Roux occupies the farm by virtue of his aboriginal title 'and in conjunction with the Customary Law and Constitution of South Africa (1996)'. The deponent to the appellant's affidavit, a director of Goedverwachting, alleges that this is a fictitiously created document and the stamp it bears of the Midvaal Municipality was fraudulently obtained. The date stamp has allegedly also been tampered with. The Midvaal Municipality has indicated that it has no knowledge of the document. Nothing was put up to refute this.

[10] Two answering affidavits have been filed. The first is that of Mr Botha, apparently in the name of the Gonas Customary & Indigenous Law Agency, and in his capacity as King of the Gona-Hesse !Khwe Royal Kingdom. He states that Mr Roux and the members of Deneys are members of his kingdom and that the land was stolen from his forefathers, the Gona-Hesse !Khwe people who are the real landowners and the true indigenous aboriginal people of South Africa. As such, Goedverwachting and Mr Keet are in possession of 'stolen goods'- the land that was stolen from their forefathers and never returned to them. Mr Botha denies staying on the farm which he describes as a false accusation by Goedverwachting. He did however assist Mr Roux and the Deneys Swiss Dairy as they are members of the Gona-Hesse !Khwe Royal Kingdom. Numerous allegations of dishonesty and fraud are made against Mr Keet.

[11] Mr Roux in a similar vein relies on the 'Gonas Customary & Indigenous Law System' to assert ownership of the farm and states that he does not, and will not,

unlawfully occupy any land. In relation to the facts contained in the founding affidavit, he states that Mr Keet sold the property to Deneys and the members of Deneys gave them 'permission to look after the farm'. Hilda McGovern, Mr Roux's daughter, filed a confirmatory affidavit wherein she confirms that she is a member of Deneys and gave Mr Roux permission to stay on the farm after Deneys 'paid' Mr Keet for the farm. No evidence of any payment is attached in substantiation.

[12] The only defence put up by the respondents is that the land in question belonged to them by virtue of their aboriginal title and because they had purchased the farm. No evidence was provided to support this defence. What is singularly lacking in both answering affidavits is any allegation that the land was being operated as a commercial venture at the time the eviction was sought. Nor is there any description of who worked on the farm. By relying on their indigenous rights to the land, the issue of whether the appellant is entitled to evict the respondents in terms of ESTA or whether they are occupiers in terms of ESTA is not pertinently addressed. Instead, the case made out by the respondents is that they are in legal occupation by virtue of their indigenous title to the land, alternatively that they are the owners of the land having purchased it from Mr Keet.

[13] It is very difficult to ascertain the situation of Deneys on the papers before this court. However, what is evident is that the dairy business did not succeed and Deneys went into voluntary liquidation at the hands of Ms McGovern who filed a special resolution in terms of s 352(2) of the Companies Act 71 of 2008. A final liquidation order was granted on 4 November 2020. It appears that during mid 2022, members of Deneys unsuccessfully attempted to have the liquidation set aside on the basis that there was value in the equity and goodwill in the brand of Deneys Swiss Dairy. From excerpts of the affidavits in the various applications, it is evident that the business of Deneys had stopped operating and had completely closed by December 2019. Mr Roux himself stated under oath on 9 April 2021 that by 6 April 2021 'there was not a single item on the premises that belonged to Deneys Swiss Dairy'.

[14] The confusion was further compounded by the respondents' heads of argument which were filed late and for which condonation was sought, and granted. In this Court, as in the LCC, Mr Roux refused legal representation. He insisted that lawyers were not to be trusted and that his daughter, Ms McGovern, would argue on his behalf. He explained that persons with legal knowledge had assisted him in drafting his heads of argument. Apart from asserting their original aboriginal title to the land, the main thrust of the heads of argument is that the legal representatives of Goedverwachting had fraudulently and dishonestly omitted to include portions of the record which would further Mr Roux's case. This is an apparent reference to papers where Ms McGovern applied to be an intervening party in the present case and an application to set aside the liquidation of Deneys. It was alleged that Deneys is not in voluntary liquidation and that Ms McGovern was coerced into signing the necessary documents and resolutions. As a result, an urgent application for the rescission of the liquidation was to be brought, and a further attempt was made to justify Ms McGovern's intervention as an interested party in these proceedings. Ms McGovern confirmed that both the application for the rescission of the liquidation of Deneys and the application for Ms McGovern to be admitted as an intervening party had been heard by the time the matter was heard in this Court. Both applications were dismissed and have not been appealed. Despite the heavy reliance on the alleged wrongdoings in respect of these applications in the heads of argument, these applications are not relevant to the issue before this Court which is whether a commercial enterprise was being conducted on the farm at the time the eviction was sought.

[15] As indicated, the finding of the LCC that the respondents did not fall within the purview of ESTA, was based solely on the probation officer's report dated 25 October 2022 provided by the Department of Agriculture, Land Reform and Rural Development. In terms of s 9(2)(c) of ESTA a court is compelled to obtain a report to ensure the 'conditions for an order for eviction in terms of section 10 or 11 have been complied with'. Section 26(3) of the Constitution requires a court to consider all relevant circumstances before ordering an eviction. The probation officer's report is merely a mechanism to place information before a court to enable it to comply with its

constitutional obligations.³ The content of the report enables the court to get an indication of what constitutional rights are implicated, including any rights to education of the children on the property; the availability of alternative accommodation to the occupier; and any other hardships that the eviction may cause the occupier. Thus the role of a probation officer's report is to assist the court in determining whether an eviction would be just and equitable in the circumstances of a particular case.

[16] The purpose for which such reports are made is clearly set out in s 9(3) of the Act which provides as follows:

'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.'

[17] The sole statement in the report upon which the LCC relied to find that a commercial enterprise was being conducted on the farm was the following:

'During the 7 years residing on the farm [Mr Roux] has also indicated that he has been farming with livestock which consist of 200 pigs and 18 cattle.'

The version apparently given to the probation officer by Mr Roux was that Deneys had entered into an agreement with Mr Keet to acquire the farm for R5 million. This was to be paid in cash of R900 000; cows to the value of R2 million and livestock feed to the value of R1,2 million. A total of R4,1 million had already been paid.

[18] Relying on the above, the LCC made the following finding:

'[36] Section 1 excludes from the definition of an occupier a person using or intending to use the

³ *Valley Packers Co-operative Limited v Dietloff and Another* [2000] ZALCC 47; [2001] 2 All SA 30 (LCC) para 7; *Nederburg Wines (Pty) Ltd v Nero and Others* [2018] ZASCA 119 paras 7-9.

land in question mainly for industrial, mining, commercial, or commercial farming purposes. On the facts of this case, the respondents have been occupying the premises since 2017 through Deneys Dairy which had an intention to purchase the farm for commercial purposes. The respondents were granted consent to occupy the farm pending payment of the purchase price. Clearly this was a commercial enterprise, and that it failed, and with the respondents continuing to occupy the property despite not having fulfilled the suspensive condition does not find for their consent in occupation of the property nor bring them in the ambit of occupiers in terms of ESTA. [37] The Probation report notes that the first respondent operates a farming business which consists of 200 pigs and 18 cattle, a commercial business. The respondents are simply excluded by section 1 by reason of the commercial enterprise. That their agreed facts stated to the contrary, they are wrong in law.'

[19] The first point is that the probation officer's report cannot usurp the court's discretion as to whether an eviction should be granted. Secondly, the report is not made under oath. It is, therefore, not evidence before the Court. Thirdly, even on Mr Roux's own version, it contained factual inaccuracies. These included the duration of his tenancy on the farm; the identity of the other occupants and his dependency on a state pension, an anomalous situation if the farm were a functioning commercial enterprise. That he received a social grant was vehemently denied by Mr Roux.

[20] The reference to livestock numbers is not sufficient to establish the scale and nature of any commercial enterprise. The report itself does not suggest that a commercial venture was being conducted and no mention is made of a functioning dairy. There is no evidence of any commercial activity at the time the eviction application was launched. The aerial photographs taken in 2022 do not reflect this. If indeed a business enterprise were operating on the farm, one would have expected some financial information to be provided. But more importantly, this was not the version put up by the respondents.

[21] This Court has repeatedly emphasised that the function of judicial officers is to determine the issues before them and to confine themselves to such issues. It is for the parties to set out and define the nature of their dispute in the pleadings and the court to

then adjudicate on the issues so defined.⁴ It is not for the judicial officer to create new factual issues particularly where the parties were not asked for their submissions whether this was an appropriate approach to the matter, or even whether the issue was in dispute.

[22] The probation officer's report cannot be used as a substitute for evidence. It was incumbent upon the respondents to raise the issue that they did not fall within the definition of an occupier in terms of ESTA and to set out the reasons therefor. The LCC impermissibly took it upon itself to make a finding on an issue that was not in dispute between the parties without hearing either party on the issue. In doing so, the LCC erred in finding that the respondents were excluded from the definition of 'occupier' under s 1 of ESTA and dismissing the application for eviction on this basis. Taking into consideration that the requirements of s 11⁵ of ESTA have been complied with, it is just and equitable to grant an order for eviction against Mr Roux and all those occupying through him.

[23] As regards costs, Goedverwaching acknowledged because land claims invariably deal with vulnerable persons, costs are only awarded in exceptional circumstances. However, it was contended that a costs order was warranted against the respondents as they had been in unlawful occupation since 2017 without paying any rental. This had resulted in ongoing financial losses. Goedverwaching only took transfer of the property in June 2021 so any financial losses can only have taken place thereafter. In any event I am not persuaded that that this is an exceptional circumstance which would justify a costs order against the respondents.

⁴ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); [2009] 2 All SA 243 paras 15-16; *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* [2022] ZASCA 51; [2022] All SA 607 (SCA); 2022 (4) SA 57 (SCA) para 9; *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 15; *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another* [2023] ZASCA 50; [2023] 2 All SA 613 (SCA); 2023 (4) SA 516 (SCA) para 66.

⁵ Section 11(2) provides that a Court may grant an eviction order in respect of any person who became an occupier after 4 February 1997 if it is just and equitable to do so while section 11(3) sets what factors the court should have regard to. These include the length of occupation of the land, the reason for the eviction, whether there is suitable alternative accommodation and the balance of interests between the owner and the occupiers.

[24] Although Goedverwaching seeks the immediate eviction of the respondents, it was conceded that this would be unduly harsh. In view of the fact that the respondents have been residing on the farm for a number of years, it is just and equitable that they be given a couple of months within which to vacate the property.

[25] In the result the following order is made:

1. The appeal is upheld.
2. The order of the Land Claims Court is set aside and substituted with the following:
'1. The first and second respondents are to be evicted from portion 17 of the farm Goedverwaching, number 442, Registration Division IR, Gauteng Province on or before 31 July 2024.
2. The Sheriff of the Court, together with the assistance of the South African Police Services, if necessary, is authorised to execute the eviction proceedings against the first and second respondents should the respondents fail to vacate the property by 1 August 2024.'
3. There is no order as to costs.

C E HEATON NICHOLLS
JUDGE OF APPEAL

Appearances

For the Appellant:

L van Gass

Instructed by:

Van Greunen & Associates Inc, Pretoria
Symington De Kok Attorneys, Bloemfontein

For the Respondent:

A.J Roux (in person)

H McGovern (in person)