

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

REPORTABLE
Case number: 452/03

In the matter between:

**LAND & LANDBOUONTWIKKELINGSBANK
VAN SUID-AFRIKA**

Appellant

and

PIERRE CONRADIE

Respondent

CORAM: **MPATI DP, ZULMAN, STREICHER,
LEWIS and VAN HEERDEN JJA**

HEARD: **8 MARCH 2005**

DELIVERED: **24 MARCH 2005**

Summary: Land – Land Reform – eviction of occupier – S 8(1) and 11(3) of Extension of Security of Tenure Act 62 of 1987 – all factors listed in subsections and other relevant factors to be considered in determining whether just and equitable to terminate right of residence (s 8(1)) and to grant eviction order (s 11(3)).

Appeal: Power of court – s 21A of Supreme Court Act 59 of 1959 empowers court to dismiss appeal where judgment or order will have no practical effect or result – court has discretion to allow appeal to proceed in certain circumstances.

JUDGMENT

MPATI DP:

[1] On 19 March 2003 the magistrate of Ceres in the Western Cape granted the appellant an order of eviction against the respondent. The order, *inter alia*, required the respondent to vacate the property (the house on the farm Klein Pruisse, Ceres) he had leased from the appellant by 31 May 2003. In terms of s 19(3) of the Extension of Security of Tenure Act 62 of 1997 (the Act) such order is subject to automatic review by the Land Claims Court, which may, *inter alia*, confirm or set it aside in whole or in part.

[2] On 12 May 2003 the Land Claims Court (Moloto J) set aside the eviction order and substituted it with one dismissing the application for eviction and made no order as to costs. (The magistrate had ordered the respondent to pay the costs of the application.) The appellant is before us with leave of the court *a quo*.

[3] In overturning the magistrate's judgment Moloto J held that he was not satisfied that the respondent's right of residence was terminated in accordance with the provisions of s 8 of the Act. The appellant's reason for seeking the respondent's eviction was that it wished to sell the property, but that prospective buyers were not prepared to purchase it if the respondent continued to occupy it.

[4] The respondent did not file heads of argument and was not represented in this court. However, on 2 March 2005 counsel for the appellant filed additional heads of argument in which we were informed that the respondent has in fact vacated the property. Clearly, an order allowing the appeal would have no practical effect or result as between the parties and the appeal may be dismissed on this ground alone (s 21A(1) of the Supreme Court Act 59 of 1959).

[5] Counsel has, however, submitted that a judgment by this court will have practical effect as a consideration of the appeal would entail a confirmation of or departure from the judgment of the Land Claims Court in *Meyer NO v Tambani* 2002 (5) SA 811 (LCC). In that case the trustee of a trust sought to evict the occupiers of a property owned by the trust on the ground that the trust had sold the property, but that the purchaser demanded to be given vacant possession. Moloto AJ dismissed the application, holding, in effect, that an occupier cannot be evicted on the sole ground that the owner wishes to give vacant possession to a purchaser.

[6] Section 21A(1) of the Supreme Court Act reads:

'(1) When at the hearing of any civil appeal to the [Supreme Court of Appeal] or any Provincial or Local Division of the [High Court] the issues are of such a nature that the

judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

The section has been the subject of a number of decisions in this court. (See, for example, *Premier, Provinsie Mpumalanga v Groblerdalse Stadsraad* 1998 (2) SA 1136 (SCA); *Western Cape Education Department v George* 1998 (3) SA 77 (SCA); *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA); *Coin Security Group (Pty) Ltd v SA National Union for Security Officers* 2001 (2) SA 872 (SCA); *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA); *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe Corporation)* 2002 (4) SA 273 (SCA); *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) and *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 (1) SA 47 (SCA).)

It is apparent from these decisions that this court will not make determinations on issues that are otherwise moot merely because the parties believe that, although the decision or order will have no practical result between them, a practical result could be achieved in other respects.

[7] As was said in *Coin Security* (at 875 para 8), however, the section confers a discretion on this court. See also *President, Ordinary Court Martial v Freedom of Expression Institute* 1999 (4) SA 682 (CC) at 687

para 13. Where, for example, questions of law, which are likely to arise frequently, are at issue a court of appeal may hear the merits of the appeal and pronounce upon it: *The Merak S: Sea Melody Enterprises SA*, supra, at 276 para 4.

[8] In the present matter counsel argued, in addition to the submission mentioned in para 5 above, that in dealing with the merits of the appeal this court may consider, and give guidance on, the requirements to be met by an owner or person in charge of the property in order to persuade a court, in eviction proceedings, having regard to the provisions of s 8(1)(a)-(e) of the Act, that the termination of the occupier's right of residence was just and equitable. A further submission by counsel was that this court, if it hears the appeal, would have occasion to consider the extent of the duty of the owner or person in charge 'to adduce the necessary averments and evidence to make out a case in relation to every provision to which the court must apply its mind in deciding whether an eviction order is justified'.

[9] Section 8 (1) of the Act reads:

'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 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.'

It is clear from these provisions that the result of their consideration will depend upon the facts of each particular case. No guidance can thus be given as to what requirements are to be met by an owner or person in charge to prove that a termination of an occupier's right of residence was just and equitable. Nor is it possible for this court to consider, in the abstract, the extent of the averments to be made and the evidence to be adduced by an owner or person in charge to make out a case for an eviction order. Each case will depend on its own facts.

[10] There is, however, a further submission by counsel, viz that the questions of law at issue here are of considerable importance and are likely

to arise frequently. Reliance for this submission was sought in *The Merak S* case, supra, para 4, where Farlam JA said:

‘In view of the importance of the questions of law which arise in this matter, the frequency with which they arise and the fact that at the time of the decision in the court *a quo* and of the granting of leave to appeal those questions were, as Mr Shaw for the appellant put it, “live issues”, I am satisfied that this is an appropriate matter for the exercise of this Court’s discretion to allow the appeal to proceed: cf *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others* 2001 (2) SA 872 (SCA) at 875 (para [8]) and *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA).’

The purpose of s 19(3) of the Act (which subjects eviction orders granted by a magistrate to automatic review by the Land Claims Court), so counsel argued, is to create a body of precedents to be followed by magistrates’ courts when they deal with eviction proceedings. That being so, an erroneous decision of the Land Claims Court on questions of law that are likely to arise with frequency should not be allowed to stand.

[11] The present matter concerns the application of the concept of ‘just and equitable’ as those words appear in s 8(1) of the Act. (The subsection is quoted in full in para 8 above.) It provides that an occupier’s right of residence may be terminated on any lawful ground, provided that such termination is just and equitable. In considering whether the termination of an occupier’s right of residence is just and equitable a court must have

regard to 'all relevant factors' and in particular those listed under items (a) to (e) of the subsection.

[12] In the instant case the court *a quo* considered whether the termination of the respondent's right of residence was just and equitable and observed that the Act does not specifically provide for a situation where the sole reason for such termination was a wish, on the part of the appellant, to dispose of the leased property. The learned judge then sought an answer from the provisions of s 24, which reads:

- '(1) The rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned.
- (2) Consent contemplated in this Act given by the owner or person in charge of the land concerned shall be binding on his or her successor in title as if he or she or it had given it.'

He then held, correctly so in my view, that the section clearly contemplates that property may be transferred from one owner to the next without tampering with an occupier's right of residence. That, of course, presupposes that the consent of the owner had not been withdrawn. But the learned judge went further and said (para 6 of his judgment):

'The termination of a right of occupation must be equitable from the perspective of the owner as well as the occupier. Should the owner attempt to justify a termination which may well have occurred in accordance with the provisions of the contract on the basis

that he no longer wants the occupier on the property, it would not pass the equity test. On the same basis, a termination on the grounds that a prospective purchaser would not want the occupier on the premises will not pass the equity test. The fact that the owner may get a higher price for the property if the occupier has left does not make the termination equitable. The position of the occupier must also be taken into account. I am not satisfied that the respondent's right of residence was terminated in accordance with the provisions of section 8.'

I agree that the question whether the termination of an occupier's right of residence is just and equitable must be considered from the perspective of both the owner and the occupier. However, the rest of the observations of the learned judge are too broadly stated. There may very well be instances where a court might find that it was not just and equitable to terminate an occupier's right of residence for the reason that the owner wishes to sell the property. But *non constat* that that will be the only factor to be considered, nor that such factor will be decisive. To determine what is just and equitable the factors enumerated in s 8(1) of the Act must be considered, together with all other relevant factors. *Mkangeli v Joubert* 2002 (4) SA 36 (SCA) at 43 para 11. See also *De Kock v Juggels* 1999 (4) SA 43 (LCC) and *Conradie v Hanekom* 1999 (4) SA 491 (LCC).

[13] In the present matter the court *a quo* does not appear to me to have considered the factors enumerated in s 8(1) of the Act. Indeed, a court

might find some of those factors to be irrelevant, but that depends on the facts of a particular case. With regard to the present matter, though - and without in any way suggesting that the others are irrelevant - one of the factors that comes to mind is the comparative hardship to the appellant and the respondent if the right of residence was or was not terminated (s 8(1)(c)). Depending on whether or not a proper defence has been raised, it would have been necessary for the court *a quo* to consider this factor. The effect of the finding of the court *a quo* is that whatever hardship an owner might face is irrelevant if the reason for terminating an occupier's right of residence is to sell the property without the burden of a lease. In my view, the approach of the court *a quo* was clearly erroneous. Furthermore, s 24 of the Act, on which it relied, merely protects an occupier, who otherwise has a right of occupation, from eviction by a new owner or person in charge on grounds that the occupation was without his or her or its consent. Such occupier may, under those circumstances, raise the defence that the occupation was with the consent of the previous owner or person in charge and therefore binding on the successor in title, which is not the case here.

[14] The issue at hand concerns the interpretation and application of the Act and is thus a question of law. I have no doubt that counsel is correct in his submission that it is likely to arise frequently. There is already a

previous reported judgment (*Meyer NO v Tambani*, supra) where a similar approach as that followed in the instant case was adopted. In my view, the present is an appropriate matter for this court to exercise its discretion in favour of the appellant and to consider the merits of the appeal. Had the appellant not proceeded with the appeal the judgment of the court below would in all probability have been followed by itself, as it did the *Meyer NO v Tambani* decision, and by magistrates' courts. Cf *Natal Rugby Union v Gould*, supra, at 444I-445B.

[15] In *De Kock v Juggels*, supra, Dodson J held that a person who seeks the eviction of an occupier under the Act must make all the necessary averments and adduce the necessary evidence to make out a case in relation to every provision to which the court must apply its mind in deciding whether an eviction order would be justified (para 13). A perusal of the founding affidavit reveals that the appellant has made averments which cover all the factors enumerated in s 8(1) of the Act. Whether all of them would be relevant in the end is another matter which it is not necessary to decide now. The respondent's notice of opposition filed in response contains nothing to gainsay those averments. Nothing is said, for example, to controvert the averments, to mention only two, that sufficient notice of the termination of the right of residence was given and that the respondent

should easily obtain alternative accommodation at the monthly rental of R3 500 he was paying to the appellant. The respondent raised technical issues in defence, such as non-compliance with certain requirements of the Act (s 9(2) and (3)), which are not fatal and which were dismissed by both the magistrate's court and the court *a quo*. In my view, the court *a quo* should have found that the respondent's right of residence had been properly terminated in terms of s 8(1) of the Act.

[16] As was said by this court in *Mkangeli*, at 44 para 12, once an occupier's right to reside has been duly terminated, his refusal to vacate the property is unlawful. But even where the provisions of s 8(1) have been complied with that does not mean that an eviction order will necessarily be granted. Section 9(2) provides that a court may make an order for eviction if certain conditions are met, which are, *inter alia*, compliance with s 8; compliance with the conditions for an order of eviction under s 10 or 11 (s 10 is not relevant here as respondent became an occupier after 4 February 1997) and the giving of two months' notice of the intended application for eviction. I have already mentioned (in para 15 above) that both the magistrates' court and the court *a quo* dismissed the only objections raised by the respondent, which were that the provisions of s 9(2) and (3) had not been complied with.

[17] Section 11 provides that a court may grant an order of eviction if it is of the opinion that it is just and equitable to do so. In deciding whether it is just and equitable to grant such an order the court must have regard to certain factors, which include a consideration whether suitable alternative accommodation is available to the occupier (s 11(3)(c)); the reason for the proposed eviction (s 11(3)(d)) and the balance of the interests of the owner or person in charge and the occupier (s 11(3)(c)). Averments in relation to these considerations have been made in the founding affidavit and as I have mentioned, there is nothing in the respondent's notice of opposition to controvert them. Under these circumstances the court *a quo* should have confirmed the order of the magistrate's court.

[18] In the result I make the following order:

- (a) The appeal succeeds with costs.
- (b) The order of the court *a quo* is set aside and for it is substituted the following:

'The order issued by the magistrate on 19 March 2003 is confirmed.'

L MPATI DP

CONCUR

ZULMAN JA

STREICHER JA

LEWIS JA

VAN HEERDEN JA