THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 915/2017 & 86/2018

In the matter between:

JAN JOHANNES ORANJE	**FIRST APPELLANT**
ZILNA ORANJE	**SECOND APPELLANT**
WARREN ORANJE	**THIRD APPELLANT**
ENVER ORANJE	**FOURTH APPELLANT**

and

ROUXLANDIA INVESTMENTS (PTY) LTD	**RESPONDENT**

Neutral citation: *Oranje & others v Rouxlandia Investments (Pty) Ltd* (915/2017) & 86/2018 [2018] ZASCA 183 (7 December 2018)

Coram: Maya P, Swain, Mathopo JJA and Carelse and Nicholls AJJA

Heard: 21 November 2018

Delivered: 7 December 2018

Summary: Extension of Security of Tenure Act 62 of 1997 (ESTA) – relocation of long – term occupier on land – suitable alternative accommodation provided – rights in terms of ss 5(*a*) and (*d*) read with s 6(2)*(a)* not affected – relocation not impacting on human dignity – relocation ordered.

ORDER

On appeal from: the Land Claims Court, Cape Town (Meer AJP sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Nicholls AJA (Maya P, Swain, Mathopo JJA and Carelse AJA concurring):

[1] This appeal deals with the respective rights of the parties when a farm owner wishes to relocate a worker from one dwelling to another, on the same farm. Aligned to this is whether the Extension of Security of Tenure Act 62 of 1997 (ESTA) finds application in such circumstances.

[2] Mr Jan Johannes Oranje is a 51-year old farm worker and the first appellant herein. He, together with his wife, the second appellant, and his two adult children, the third and fourth appellants, reside on the farm Kaaimansgaat, which is owned by Rouxlandia Investments (Pty) Ltd (Rouxlandia), the respondent. Mr Oranje's father worked on the farm during his lifetime and Mr Oranje was born there. He has lived on the farm most of his life.

[3] In 2000, Mr Oranje started working fulltime on the farm as a general labourer. So did his wife. The Oranje family had the use of a house on the farm as part of Mr Oranje's contract of employment. Soon thereafter, in 2001, Mr Oranje suffered serious injuries while driving a tractor in the course and scope of his employment. There is a dispute as to whether Mr Oranje's negligence was the cause of the accident but nothing

turns on this. It is common cause that he continued working on the farm until he was declared medically unfit thirteen years later. Mrs Oranje was herself medically boarded in 2007. Although she no longer worked there, she and the family continued residing on the farm with Mr Oranje.

[4] The farm has 102 workers' houses, of which 6 were upgraded to managers' houses in 2013. On 16 December 2013, Mr Oranje entered into a housing agreement with Rouxlandia in terms of which he and his family became entitled to occupy a manager's house. It was a specific term of the housing agreement that the house was allocated only to management members and if the primary occupant no longer occupied a management position, the housing agreement would be terminated on 30 days' notice. Mr Oranje's continued occupation of the house was conditional upon him remaining permanently employed as a manager on the farm.[1]

[5] Approximately six months after taking occupation of the farm manager's house, in June 2014, Mr Oranje was declared medically unfit for work and his employment on the farm came to an end. He did not move out of the house. More than a year later, on 1 September 2015, Rouxlandia's management team convened a meeting with Mr Oranje to discuss his continued residence in the house.

[6] At the meeting, Mr Oranje was informed that he and his family should move from their managers' house to a smaller house on the farm. He refused to do so. The following day, on 2 September 2013, it was recorded in a letter sent to him that he had been offered alternative accommodation but had refused to participate in the meeting.

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[1] Clause 1(d) of the Housing Agreement loosely translated from English reads: 'It is understood that the relevant house is specifically allocated and is applicable to management members. In the case where the primary occupant no longer occupies a management position, for whatever reason, this housing agreement shall be terminated with 30 days' written notice.'
Clause 9(a), also loosely translated from English, goes on to read: 'As prescribed in clauses 1(d) and 9(c) of this agreement, this housing agreement will be terminated when the Responsible Occupier's permanent service as management member with the Employer terminates and/or for any other reasons as contained in this agreement, as well as for any reasons as prescribed by law.'

He was given 30 days' written notice to vacate the manager's house in which he was residing.

[7] In May 2016, Rouxlandia launched an application in the Land Claim's Court (LCC) seeking an order to have Mr Oranje and his family relocated from the managers' house to a smaller house on the same farm. On 28 March 2017, the court a quo (Meer AJP) granted Rouxlandia's order for relocation. Leave to appeal to this court was granted on limited grounds, namely whether the alternative accommodation was suitable and whether Mrs Oranje should have been joined as respondent with separate substantive grounds alleged for her relocation.

[8] The appellants then brought an application before this court that the grounds on which leave to appeal was sought be amplified to include three further grounds of appeal. These were: (1) whether the requirements for a final interdict had been met; (2) that Rouxlandia did not make out a cause of action as it did not allege that it had given the 30 days' notice required by the housing agreement; and (3) that the LCC erred in not appreciating that it had a discretion in terms of s 26(3) of the Constitution to refuse the relocation order based on considerations of equity and justice. The amplified leave was granted by this court on 19 October 2017.

[9] It was the third ground which was the nub of the appeal before this court. The argument of the appellants was two-pronged. In the first, the appellants sought to rely on the Constitution. Failing that, it was argued that the right to remain in their house was located in s 5 and s 6 of ESTA.

[10] The starting point is the decision of this court in *Chagi v Singisi Forest Products (Pty) Ltd*,[2] which conclusively spelt out whether a relocation could amount to an eviction as contemplated by ESTA. The court held that because s 6 encroaches upon a landowner's right of ownership, it should be restrictively interpreted.[3] Therefore an eviction in terms of ESTA is confined to an eviction from the land, not from one dwelling

[2] *Chagi v Singisi Forest Products (Pty) Ltd* [2007] ZASCA 63; [2007] SCA 63 (RSA).
[3] Id para 17.

to another. As such, a relocation could not amount to an eviction in terms of ESTA. The appellants did not suggest otherwise. Nor indeed is this avenue available to the appellants.

[11] Instead the contention was that, while a relocation is not an eviction in terms of ESTA, it amounted to an eviction in terms of s 26(3) of the Constitution, which provides that:

'No one may be evicted from their home, or have their house demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

[12] It is not entirely clear how this provision assists the appellants. In any event, direct reliance on the Constitution is ill-conceived. The subsidiarity principle applies unless the provisions of the specific legislation do not adequately give effect to the constitutional rights in question.[4] This means that it is impermissible for a court to bypass legislation specifically enacted to give effect to a constitutional right and to decide the matter on the basis of the constitutional provision that gives effect to the right.[5] ESTA and The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) were specifically enacted to protect the most vulnerable sectors of our community from homelessness and lack of security of tenure. Together they form an integral component of the legislative measures designed to achieve the progressive realisation of the right to housing enshrined in s 26 of the Constitution. Accordingly, absent a finding that the protection provided by ESTA is in some manner deficient, there is no justification for direct reliance on the Constitution. No deficiency could be identified by counsel for the appellants.

[13] In the second prong of their constitutionality argument, the appellants sought to locate their right to resist relocation in s 5 and s 6 of ESTA. It is common cause that

[4] *Baron & others v Claytile (Pty) Ltd & another* [2017] ZACC 24; 2017 (5) SA 329 (CC) para 10.
[5] *Minister of Health & another N.O. v New Clicks South Africa (Pty) Ltd & others* [2005] ZACC 14; 2006 (2) SA 311 (CC) para 437.

Mr Oranje is an 'occupier'[6] as defined by ESTA. His right to reside on the farm is, therefore, guaranteed. Under the heading 'Rights and Duties of Occupiers and Owners' the relevant portions of ss 5 and 6 read as follows:

'**5. Fundamental rights** - Subject to limitations which are reasonable and justifiable in an open and democratic society based on human rights, dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to–

(a) human dignity;

(b) freedom and security of the person;

(c) privacy;

(d) freedom of religion, belief and opinion and of expression;

(e) freedom of association; and

(f) freedom of movement,

with due regard to the objects of the Constitution and this Act.'

'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 the person in charge, an occupier shall have the right–

(*a*) to security of tenure;

(*b*) to receive *bona fide* visitors at reasonable times and for reasonable periods: Provided that–

. . .

(*c*) to receive postal or other communication;

(*d*) to family life in accordance with the culture of that family . . .

(*dA*) to bury a deceased member of his or her family . . . on the land which on which the occupier is residing..

(*e*) not to be denied or deprived of access to water; and

(*f*) not to be denied or deprived of access to educational or health services.'

[6] In s 1 of ESTA an 'occupier' 'means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding . . . .'

[14] The position contended for, as I understand it, is that ss 5(*a*) and (*d*) of ESTA, which provide for the rights to human dignity and privacy, read with s 6(2)*(a)*, which provides for the right to security of tenure, shield the appellants from any attempt at relocation. These provisions of ESTA afford them the right to remain in their house and protect them from any attempted relocation. Absent such an interpretation, so the argument goes, there would be nothing to prevent the appellants being moved to an inhabitable shack on the same farm.

[15] For this submission reliance was placed on *Daniels v Scribante & another.*[7] In *Daniels,* Ms Daniels wished to effect basic improvements, at her own expense, to her dwelling. She had resided in the house together with her family for thirteen years. It was accepted by the parties that the dwelling was in a deplorable state and lacked the most basic of human amenities, including running water. Mrs Daniels successfully argued, in the Constitutional Court, that her rights in terms of s 5 and 6 of ESTA included the right to make improvements to her dwelling. The counter argument by the respondent was that the totality of an occupier's rights was located in s 6 of ESTA. The right to make improvements to one's dwelling is not one of the rights specified in s 6 and therefore Mrs Daniels had no rights in terms of ESTA to effect any improvements to her dwelling

[16] The Constitutional Court rejected this approach to the interpretation of the statute[8] and found this reading of s 6 to be unduly narrow, taking into consideration the constitutional context and the purpose for which ESTA was enacted. The Constitutional Court found that the living conditions of Mrs Daniels did not accord with basic human dignity and 'like the notion of 'reside' security of tenure must mean that the dwelling has to be habitable'.[9] While accepting that the constitutional rights enjoyed by Mrs Daniels were circumscribed to the extent provided for in ESTA, which does not make specific mention of the right to make improvements, the Constitutional Court held that to deny

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[7] *Daniels v Scribante & another* [2017] ZACC 13; 2017(4) SA 341 (CC) (*Daniels*).
[8] The Constitutional Court cited with approval *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA 490; 2004 (7) BCLR 687 (CC).
[9] See *Daniels* fn 7 para 32.

Mrs Daniels the right to make her dwelling habitable was to deprive her of her human dignity.

[17] Adopting the same broad interpretative approach, there can be little doubt that the right to refuse relocation can be accommodated within the rubric of s 6 of ESTA. The specified rights and duties conferred on an occupier in terms of s 6 of ESTA are not exhaustive. The right to security of tenure in terms of s 6(2)*(a)* could, conceivably, have application in such situations. Relocation to an uninhabitable dwelling would offend an occupier's right to live in accordance with basic human dignity, as was found by the Constitutional Court in *Daniels*. In such circumstances, where a relocation infringes an occupier's human dignity, this could be successfully resisted by invoking ss 5*(a)* and 6(2)*(a)* of ESTA.

[18] However, what of the situation where a relocation does not impact on the human dignity of the occupier? The Constitutional Court has acknowledged that the right of residence conferred by s 8 of ESTA is not necessarily tied to a specific house.[10] The protection afforded by those parts of ss 5 and 6 of ESTA on which the appellants rely, is to ensure that an occupier will not be subjected to inhumane conditions violating human dignity. To this extent, an occupier's right to resist relocation is protected. But these sections do not amount to a blanket prohibition on relocation under any circumstances. If indeed the relocation were to impair an occupiers' human dignity, then the provisions of s 5 and s 6 would apply and the occupiers could invoke their constitutional rights. This does not mean that all relocations necessarily suffer the same fate.

[19] In this matter, the entitlement of Mr Oranje and his family to reside in the house arose from a housing agreement. Once the housing agreement was terminated his contractual right to reside in that particular house was also terminated. It was on this basis that Rouxlandia sought to have the Oranje family relocated. Because Mr Oranje is a long-term occupier with his right to reside on the land guaranteed in terms of ESTA,

[10] *Snyders & others v De Jager & others* 2017 (3) SA 545 (CC) para 77.

Rouxlandia correctly accepted that they had an obligation to provide suitable alternative housing.

[20] Suitable alternative accommodation is defined in s 1 of ESTA as 'alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation'.[11] Rouxlandia has offered alternative accommodation. It is not a manager's house but a smaller 5-roomed house. It has been newly painted and has running water, a flush toilet and an inside bathroom. The roof is corrugated iron and is leak-free. The criteria for suitability have, in my view, been fulfilled. In any event, Mr Oranje does not object to the alternative accommodation on the basis that it is unsuitable. His complaint is that it does not befit the status of a manager. He wants a 'bigger and better' house.

[21] ESTA was not enacted to provide security of tenure to an occupier in the house of his or her choice. The primary purpose of ESTA as set out in the preamble is:

'To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and the circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from the land; and to provide for matters connected therewith.'

[22] Mr Oranje's long-term security of tenure is not threatened. His continued residency on the farm is not in dispute. His entitlement to the particular house that he wishes to occupy is contractually linked to his employment as a manager, which employment has now ended due to his ill health. He has been provided with suitable alternative accommodation. In these circumstances any reliance on his right of security of tenure, in terms of s 6(2)*(a)* read with his right to human dignity in terms of s 5*(a)* of ESTA, is misplaced.

[11] See *Drumearn (Pty) Ltd v Wagner & others* 2002 (6) SA 500 (LCC), where it was held that although relocation was not an eviction, it affects the rights of occupiers and, therefore, the accommodation that the occupiers were being located to must be suitable accommodation as defined in ESTA.

[23] Rouxlandia was entitled to enforce its rights at common law to terminate Mr Oranje's occupancy in that particular house, subject to the proviso that none of Mr Oranje's ESTA rights are infringed. It is my view that they have not.

[24] Rouxlandia sought final interdictory relief in the LCC. Although the jurisdiction of the LCC was not argued before us, the LCC was of the view that Rouxlandia's cause of action could be located in s 20(1) of ESTA. Section 20(1) gives the LCC the 'ancillary powers necessary or reasonably incidental to the performance of its functions' in terms of ESTA. This includes the power to decide any constitutional matter in relation to ESTA in terms of s 20(1)*(a)* and to grant interlocutory orders, declaratory orders and interdicts in terms of s 20(2)*(b).* This view cannot be faulted.

[25] The other points on appeal were not strenuously pursued. But neither were they abandoned and I deal with them briefly. To suggest that the claim for relocation was not established because there was no allegation in the founding affidavit that the requisite 30 days' notice period had been given, as was argued, is to elevate form over substance. There was no dispute that 30 days' written notice had in fact been given. Nor was there any dispute that the employment relationship had been terminated because Mr Oranje was medically unfit to work. In addition, the requirements for a final interdict had been met. Rouxlandia had a clear contractual right to terminate Mr Oranje's occupation of the manager's house, (which he occupied only on the basis of his managerial position), and was then obliged to provide suitable alternative accommodation in terms of ESTA, which it did.

[26] Insofar as it was contended that Mrs Oranje has an interest separate from that of Mr Oranje, this is based on an incorrect interpretation of *Klaase & another v Van der Merwe & others.*[12] In that matter the Constitutional Court considered whether Mrs Klaase had the right to reside on the land as an occupier in terms of ESTA, separate to that of her husband. In the present matter it is common cause that Mrs Oranje is an occupier in her own right. Unlike Mrs Klaase there is no question of her being evicted from the land. Nonetheless, she was joined in the proceedings and filed a confirmatory

[12] *Klaase & another v van der Merwe & others* [2016] ZACC 17; 2016 (6) SA 131 (CC).

affidavit in support of her husband's allegations. Any rights Mrs Oranje possesses to live in the manager's house flow from her husband's housing agreement with Rouxlandia. It is accordingly unnecessary to allege separate substantive grounds for her relocation.

[27] All common law must be subject to constitutional scrutiny, particularly in matters affecting occupiers' rights of residence.[13] The owner's assertion of its common law rights in the circumstances of this case, is not in conflict with any constitutional imperative contained in s 26(3) of the Constitution. There is no question that homelessness will ensue. There are no considerations of fairness and equity which would preclude Rouxlandia from relocating Mr Oranje and his family. Suitable alternative accommodation has been provided, albeit not as spacious as the manager's house they presently occupy. The human dignity of Mr Oranje has not been impaired. His constitutional right to housing has not been denied. The appeal must accordingly fail. No order as to costs was sought by either party.

[28] In the result the following order is made:
The appeal is dismissed.

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C H Nicholls

Acting Judge of Appeal

[13] *Molusi & others v Voges N O & others* 2016 (3) SA 370 (CC).

APPEARANCES:

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