

Substantive and Procedural Fairness of Eviction Notices in terms of the Extension of Security of Tenure Act

Rheeder and Another v Engelbrecht and Another 2024 JDR 3809 (LCC)

INTRODUCTION

The Land Claims Court's judgement in *Rheeder and Another v Engelbrecht and Another* ("Rheeder")¹ deals with the interpretation of the Extension of Security of Tenure Act² regarding the procedure of lawful termination of the right to reside and the principles of just and equitable eviction.

BACKGROUND FACTS OF THE CASE

The Applicants sought to evict the Respondents from a farmhouse on Badshoogte Farm, Western Cape, which farm belonged to the Applicants.

Circa 2020, the Applicants agreed to accommodate the Respondents by allowing them to reside in one of the houses on their farm.

Initially, the parties had no agreement as to rental amounts. However, in November 2020, the parties entered into an oral rental agreement, allowing the Respondents to reside on the farm for a monthly rental amount. The oral lease agreement was expected to last for 12 months, and the Respondents paid R18,000.00 to the Applicant, being equivalent to a year's rental in advance.

After the lapse of 12 months, the Respondents ceased to make payment of any rental amounts to the Applicants.

On 7 June 2022, the First Applicant served a notice on the Respondents, effectively notifying the Respondents that their right to reside in the house on the farm had been terminated and that the Applicants intended to obtain an eviction order in the event of the Respondents not vacating the property within two months.

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When the Respondents failed to vacate the farm after two months, the Applicants initiated eviction proceedings in the Magistrate's Court of Calitzdorp ("the Magistrate's Court").

THE ARGUMENTS AND DECISION IN THE MAGISTRATES' COURT

The Applicants contended that they were entitled to an Order of eviction of the Respondents.

In support of their contention, the Applicants submitted that the Respondents' right to reside had been terminated by proper notice given and that the Respondents did not vacate the Property within two months, thereby fulfilling the triggering requirements for an eviction contained in sections 8 and 11 of the ESTA.

The Respondents opposed the eviction application, disputing the termination's validity and alleging that they had made various improvements to the property, including installing solar panels and paying for a water connection. They also argued that they would face homelessness if evicted, as there was no alternative accommodation available to them.

After reviewing the evidence before the Magistrate's Court given by counsel for both parties, the Magistrate ruled in favour of the Applicants and ordered the Respondents to vacate the farm on 30 April 2024.

WHICH LAW APPLIES TO EVICTIONS FROM LAND?

The Prevention of Illegal Eviction and Unlawful Occupation of Land Act³ (known as "PIE") applies to evictions from all land throughout South Africa unless the Extension of Security Tenure Act⁴ (known as "ESTA") applies to exclude jurisdiction under PIE.

ESTA applies to "...all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law or encircled by such a township or townships, but including (a) any land within such a township which has been designated for agricultural purposes in terms of any law...".⁵

The first step then in any eviction is to determine which law applies to the eviction in question – PIE or ESTA.

As the farm in question fell within the ambit as set out above, because the land was clearly farm land, the applicable statute in this matter was the ESTA, which possesses its own set of procedural requirements distinguishable from that of the PIE.

The ESTA is designed to ensure long-term land tenure security with support from the State. It sets out the rules for living on specific land, outlines when and how a person's right to reside can be terminated and governs the conditions under which individuals can be evicted after their right to live on the land has been terminated.⁶

PROCEDURAL FAIRNESS UNDER ESTA

The Land Claims Court in *Rheeder* investigated the procedural fairness of the eviction by considering the Applicants' compliance with the provisions of the ESTA, specifically sections 8, 9, and 11 thereof.

Section 8 provides that the right to reside may be terminated on any lawful ground, provided that such termination is just and equitable, considering factors such as the fairness of the agreement, the conduct of the parties, and the comparative hardship caused by the termination.

Section 9 outlines the conditions under which a court may issue an eviction order. In sum, section 9 requires that the occupier's right of residence must first be lawfully terminated, that they did not vacate the premises following notice, and that all conditions for eviction in terms of the Act have been met.

Section 11 provides that a court may grant an order for eviction in the event that the termination of the right of residence would terminate upon a fixed and determinable date formed an express, material and fair term of such agreement.

In the absence of a fixed and determinable date of termination of a right to reside, section 11 requires the court to consider whether it is just and equitable to grant an eviction order taking into account factors such as the period of residence, the availability of alternative accommodation, the reasons for the proposed eviction and the interests of all parties involved.

WHAT THE LAND CLAIMS COURT SAID ABOUT A "TWO-STEP PROCESS" AND "HYBRID APPROACH" TO EVICTION UNDER ESTA

The matter was sent on review to the Land Claims Court. The Land Claims Court reviewed the Magistrate's decision and found several procedural flaws in handing down the eviction order.

The Land Claims Court specifically highlighted the fact that the Applicants had attempted to evict the Respondents using a "hybrid approach," by combining a notice of termination of the right to reside in terms of section 8 and an intention to evict in terms of section 9 of ESTA in the same document.

In considering the validity, fairness and lawfulness of the hybrid notice approach adopted by the Applicants, the Land Claims Court considered the judgements in *Aquarius Platinum (SA) (Pty) Ltd v Bonene and Others ("Aquarius")*⁷, *Snyders and Others v de Jager and Others ("Snyders")*⁸, and *Cosmopolitan Projects Johannesburg (Pty) Ltd v Leoa & Others ("Cosmopolitan")*⁹.

In *Aquarius*, the Supreme Court of Appeal held that the ESTA mandates a two-stage process for eviction proceedings to protect the rights of vulnerable individuals.

The two-step process requires:

firstly, that a notice of termination of the occupier's right of residence is issued in accordance with section 8. This termination must be based on lawful, just, and equitable grounds, taking into account the fairness of the procedure used to reach the decision, and it must be properly communicated to the occupier; and

secondly, once the right of residence has been terminated under Section 8, section 9(2) of the Act allows for an eviction order if the occupier has not vacated the land. For the eviction to proceed, the owner or person in charge must serve a **two-month written notice** of the intention to obtain an eviction order. Section 8(2), read together with section 8(1), further specifies what constitutes a just and equitable reason for terminating the right of residence.

In *Snyders*, the Constitutional Court asserted that section 8(1) requires that the termination of a person's right of residence must be both substantively and procedurally fair.

Substantive fairness means that the termination itself must be just and equitable, while procedural fairness, as outlined in section 8(1)(e), requires that the individual be given a fair opportunity to present their case before the termination is finalised.

The Court in *Snyders* held eviction cannot proceed unless the right of residence has been properly terminated. If these procedural and substantive requirements are not met, the termination and subsequent eviction are considered unlawful and invalid.

In **Cosmopolitan**, the Court held that the hybrid approach of serving a single notice that effectively terminates the right of residence as well as notifying the resident of eviction proceedings is impermissible and invalid.

The Land Claims Court also criticised the Magistrate's failure to address the substantive and procedural fairness required by section 8 of the Act, as it failed to consider the two-stage process as to whether a notice of termination of right of residence was served before the notice of eviction as to afford the Respondents a reasonable opportunity to provide reasons why the Respondents should not be evicted.

Although the Respondents were found to unlawfully occupy the Applicants' land, the Land Claims Court held that the proper procedure for eviction had not been followed, making the eviction order unjust and inequitable.

ENTRENCHMENT OF THE TWO-STEP PROCESS TO EVICTION UNDER ESTA

The Land Claims Court's finding in *Rheeder* further entrenches the principle that the process of eviction under the ESTA must adhere strictly to procedural and substantive requirements to ensure fairness to the occupier. The process must unfold precisely as required by law, which requires a two-step process: first, the lawful termination of the right of residence, and second, the issuance of a notice for eviction. These two process cannot unfold through the issuing of a single notice and a single timeframe for compliance – they must be separately carried out with different timeframes and notices given for each.

By setting aside the Magistrate's order, the Land Claims Court held that non-compliance with the requirements of sections 8 and 9 as independent and severable requirements for an eviction order in terms of ESTA renders such an eviction order invalid.

TAKE HOME ADVICE

The judgement in *Rheeder* serves as a reminder that even in circumstances where occupiers are in breach of their lease terms, evictions must always be approached in a manner that is both just and equitable with strict adherence to the procedural mechanisms provided for in statute. Although it can be tricky to determine which law applies, and what the strict procedural and substantive elements of that law require, if this is not done ultimately eviction will not be granted.

Kindly contact the authors of this article on 011 568 8500 for more information.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice.

Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated here.

¹*Rheeder and Another v Engelbrecht and Another 2024 JDR 3809 (LCC)*

²*Act 62 of 1997*

³*Act 19 of 1998 ("PIE")*

⁴*Schedule II of Act 19 of 1998*

⁵*Section 2(1) of Act 62 of 1997*

⁶*Preamble of Act 62 of 1997*

⁷*Aquarius Platinum (South Africa) (Pty) Ltd v Bonene and Others 2020 (5) SA 28 (SCA)*

⁸*Snyders and Others v De Jager and Others 2017 (3) SA 545 (CC)*

⁹*Cosmopolitan Projects Johannesburg (Pty) Ltd v Leoa 2019 JDR 1000 (LCC)*



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