

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

In Chambers

CASE NUMBER: LCC7R/98

In the review proceedings in the matter between:

RICHARD ATKINSON

Plaintiff

and

ABE VAN WYK

1st Defendant

DINA NATUS

2nd Defendant

JUDGMENT

DODSON J:

[1] This matter was referred to the Land Claims Court by way of automatic review in terms of Section 19(3) of the Extension Security of Tenure Act.¹ I will refer to it as the “ESTA”. The plaintiff issued summons in the Paarl Magistrate’s Court against the defendants for their ejection from a cottage on his farm. First defendant vacated the plaintiff’s farm voluntarily on a date that is not clear from the documents. Second defendant did not do so and plaintiff accordingly applied for default judgment against her.

[2] The particulars of claim in the matter read as follows:

- (1) The Plaintiff is Richard Atkinson an adult male of Waterfall Farm, Road R45, Franschhoek Valley.
- (2) The First Defendant is Abe van Wyk an adult male of The First Cottage (“the Premises”), Waterfall Farm, Road R45, Franschhoek Valley.

¹ Act 62 of 1997.

(3) The Second Defendant is Dina Natus an adult female of The First Cottage, Waterfall Farm, Road R45, Franchhoek Valley.

(4) The Plaintiff is the registered and lawful owner of the Premises and is entitled to occupation thereof.

(5) The Defendants are in unlawful occupation of the Premises.

(6) Notwithstanding demand the Defendants fail, refuse and/or neglect to vacate the Premises.

WHEREFORE the Plaintiff prays for Judgment against the Defendants jointly for:

1 The ejection of the Defendants and all persons having occupation of the Premises by, through or under the Defendants or either of them.

2 Costs of suit.

3 Other or alternate relief.

[3] The subsequent sequence of events is described by the Magistrate as follows:

“2 Soos blyk uit die stukke is aksie teen die [tweede] verweerder ingestel vir uitsetting. Toe aansoek gedoen is om vonnis by verstek het [ek] . . . die volgende opmerking gemaak:

“Daar is geen aanduiding dat voldoen is aan die bepalings van Artikel 9(2) van Wet 62 van 1997.”

“3 Die Prokureur van die Eiser het daarop gesertifiseer dat die bepalings van die Wet nie van toepassing is nie.

“4 Op die beskikbare inligting kan ek nie ’n ander beslissing maak nie en het vonnis by verstek toegestaan.

“5 Die beslissing van David Karabo en ander teen George Frederick Marx Kok en ander (Saak 5/98) het nadat ek die bevel verleen het tot my aandag gekom. Die feit dat plaaseiendom

waarskynlik betrokke is, noop my om die stukke nietemin aan u kragtens Artikel 19(3) van die Wet vir u beslissing voor te lê.”

[4] As appears from paragraphs 2 and 3 of this extract, the magistrate was concerned that the ESTA may apply. He therefore requested the plaintiff’s attorney to provide him with a certificate containing his submissions as to whether or not the ESTA applied. A written certificate, signed by the plaintiff’s attorney, was duly filed. It reads as follows:

- “1 Act 62 of 1997 does not apply in the above matter.
- 2 [Second] Defendant originally occupied the premises with the consent of Mr Abe van Wyk, who in turn had the necessary consent to occupy the premises solely in terms of his employment agreement with the owner of the land on which the premises are situate.
- 3 In December 1996 Mr van Wyk voluntarily left his employment and thus lost all his rights to occupation of the said premises (See Section 8(2)). He also proceeded to vacate the said premises.
- 4 [Second] Defendant, however, despite never having had any right to occupy the premises and despite never having gained any right or consent to occupy the premises, remained on the premises.
- 5 [Second] Defendant has also since taking occupation, allowed other persons having no consent of the owner or any other right of occupation, to remain there.
- 6 Despite several notices and/or demands, [second] defendant and the other occupiers of the premises have refused to vacate the said premises.
- 7 [Second] Defendant has therefore never had the consent of the owner or any other right to remain on the premises and as such does not qualify as an occupier in terms of the said Act.”

[5] When the matter was referred to the Court in terms of Section 19(3), the parties were invited in terms of the then proviso to Section 19(3) of the Act to make written submissions as to why the magistrate’s order should not be set aside. The plaintiff’s attorney submitted a written

submission. However, the Deputy Sheriff for the area concerned was unable to trace the second defendant as she had, some time before the matter was sent to the Court on automatic review, been ejected in terms of a warrant of ejectment issued pursuant to the magistrate's order.

[6] The proviso to Section 19(3), which has since been deleted,² reads as follows:

“Provided that before the Court makes any order in terms of paragraph (b) or (c), it shall give the parties an opportunity to make written submissions, and may give the parties an opportunity to make oral submissions, in that regard.”

In view of the fact that second defendant could not be contacted to provide written submissions, the matter was held in abeyance. However, the second defendant has never been located, submissions have never been received from her and it seems to me that there was sufficient compliance with the proviso if the Deputy Sheriff has attempted to find her to give her the opportunity to make such submissions. I therefore proceed to decide the matter.

[7] In as much as the magistrate (as opposed to the clerk of the court) dealt with the request for default judgment in this matter, it was presumably referred to him in terms of rule 12(7) of the Magistrate's Court Rules. The relevant portions of rule 12(7) read as follows:

“(7) The clerk of the court may refer to the court any request for judgment and the court may thereupon-

(a) if a default judgment be sought, call upon the plaintiff to produce such evidence either written or oral in support of his claim as it may deem necessary;

. . . .

(c) give judgment in terms of plaintiff's request or for so much of the claim as has been established to its satisfaction;

. . . .

(e) refuse judgment;”

² The proviso was deleted in terms of section 28 of the Land Affairs General Amendment Act No 61 of 1998.

[8] Having received the certificate from the attorney,³ it was then up to the magistrate to evaluate the information submitted and decide whether or not the plaintiff was entitled to default judgment. At this point the magistrate erred, because the certificate suggests, *prima facie*, that the second defendant had a defence to the action. The plaintiff sought in the certificate to avoid the application of the ESTA on the basis that the second defendant had never had the consent of the owner to reside on the premises. On this basis it was contended that she did not fall under the definition of occupier in section 1 of the ESTA. The relevant portion of the definition reads as follows:

“ ‘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, . . .”

This definition must be read with the definition of consent in section 1 of the ESTA:

“‘consent’ means express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, includes the express or tacit consent of such holder;”

The definition of occupier must also be read with section 3(2) of the ESTA which reads:

“(2) If a person who resided on or used land on 4 February 1997 previously did so with consent, and such consent was lawfully withdrawn prior to that date-

(a) that person shall be deemed to be an occupier, provided that he or she has resided continuously on that land since consent was withdrawn; and

(b) the withdrawal of consent shall be deemed to be a valid termination of the right of residence in terms of section 8, provided that it was just and equitable, having regard to the provisions of section 8.”

³ It is not necessary, in my view, for me to decide on the correctness of the magistrate’s decision to call for a certificate from the attorney. If he acted in terms of rule 12(7)(a), then it seems to me that, if he wanted written evidence, this should have been in the form of an affidavit from the plaintiff or other person able to testify to the relevant facts. On the other hand, where rule 12(4) refers to evidence it refers expressly to “evidence either oral or *by affidavit*”. I have not been able to find any authority in relation to this particular aspect of the rule.

[9] Paragraph 2 of the attorney's certificate quoted in paragraph 4 above states that the second defendant occupied the premises with the consent of the first defendant while the latter's employment with the plaintiff subsisted. It does not say that the second defendant had the consent of the plaintiff at the time that she so occupied the premises. However, in the absence of any explanation to the contrary, the probability is that the plaintiff, as owner, would have been aware of a person who occupied one of his employee's cottages with the consent of the employee. If he was aware of her occupation and did not object to it when the employment contract still subsisted, that would have been sufficient to constitute tacit consent. Tacit consent is sufficient for purposes of the ESTA.⁴ If the second defendant did originally have tacit consent to reside on the farm, then even if it terminated with the termination of the employment of the first defendant, the effect of the original consent, together with the fact that the second defendant continued to reside on the land, would have brought her under the provisions of section 3(2) of the ESTA.⁵

[10] The second defendant's position is also strengthened by the presumption contained in section 3(4) of the ESTA which reads:

“For the purposes of civil proceeding in terms of the Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.”

It is clear from the certificate provided by the plaintiff's attorney that the second defendant resided on the land during December 1996 at the latest and continuously and openly resided on the land until summons was issued on 28 January 1998 and after that until her eviction on 3 April 1998. This brings the presumption into operation against the plaintiff and the evidence in the certificate, if it can be described as evidence, is certainly not sufficient to disprove consent. On the contrary, as I have explained above, the certificate suggests prima facie that there was consent as contemplated in the ESTA.

⁴ See the definition of consent quoted in paragraph 8 above.

⁵ See paragraph 8 above.

[11] If the second defendant was an occupier in terms of the ESTA, the plaintiff would have had to show compliance with the various requirements of section 9(2) of the ESTA.⁶ These requirements must be met before a court may order the eviction of an occupier. No such compliance has been shown.

[12] In my view the proper exercise of the magistrate's discretion in terms of rule 12(7) required him either to refuse default judgment or to call for oral evidence or further written evidence in terms of rule 12(7)(a) to give the plaintiff the opportunity to adduce facts which might discharge the onus of disproving that he consented to the second defendant's occupation of the premises. The latter option would, in my view, have been preferable. The nature of the discretion exercised

⁶ Section 9(2) reads:

“(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.”

by the magistrate in terms of this rule was described in *Credex Finance (Pty) Ltd v De Villiers NO and Others*⁷ as follows:

“There is thus no reason for limiting the wide words used in sub-rule (7) (a). It appears to me to be quite plain that it has been left to the court to decide what evidence to call for in terms of Rule 12 (7) (a) and that it has a discretion to call for such evidence as it may deem necessary. This discretion is wholly unfettered save that it is to be exercised judicially.”⁸

[13] Although the magistrate’s discretion in terms of rule 12(7) is no doubt a wide one, that does not prevent this Court from considering the correctness of its exercise on review. This Court’s powers in exercising its review function are wide. They were described by this Court in *Lategan v Koopman en andere*⁹ as follows:

“Daar is, na my wete, geen presedent vir outomatiese hersiening van vonnisse in siviele verrigtinge in Suid-Afrika nie. Die instelling van outomatiese hersiening is reeds vir ‘n geruime tyd deel van ons strafregstelsel. Dit is uniek aan Suid-Afrika. Die hof kan leiding uit die werking van die instelling in die strafreg neem om die omvang en trefkrag daarvan ingevolge die Verblyfregwet te bepaal. Outomatiese hersiening is nie beperk tot ‘n ondersoek na ongerymdhede nie. Prof Skeen sê (met betrekking tot die hersiening van vonnisse in strafsake) :

‘Although the procedure is called a review, it is really a review and an appeal rolled into one, because any point on which the proceedings can be faulted will be taken into account, whether it is an irregularity or not.’

Die hof moet as uitgangspunt bepaal of geregtigheid geskied het. Sodoende sal die hof ‘n breë benadering volg, en die bevinding van die landdros nie so nougeset onder oë neem as wat by ‘n appél die geval mag wees nie.’¹⁰

⁷ 1978 (2) SA 25 (N).

⁸ At 32B.

⁹ 1998 (3) SA 457 (LCC).

¹⁰ At 463H to 464C.

The breadth of the Court's powers is also apparent from the wide range of remedies available to it in terms of paragraphs (a) to (d) of section 19(3) of the ESTA when performing its review function.

[14] In my view, a proper application of the Court's powers in terms of section 19(3) renders the magistrate's decision reviewable for the reasons given above. In the circumstances, I make the following order:

- 1 The magistrate's decision is set aside in its entirety in terms of Section 19(3)(b) of the Extension of Security of Tenure Act 62 of 1997;
- 2 In the event that the application for default judgment is renewed on the same papers, the magistrate is directed in terms of section 19(3)(d) of the said Act to call upon the plaintiff to produce affidavit or oral evidence in order to decide whether or not the plaintiff has discharged the onus of proving that the second defendant did not have consent to occupy the land concerned.

JUDGE A DODSON

Handed down on: 10 December 1998

For the plaintiff:

Mr J Oosthuizen of Minitzers Attorneys, Paarl.

For the 1st and 2nd defendants:

Unrepresented