

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

**RANDBURG**

**CASE NUMBER:LLC11R/99**

In Chambers: **GILDENHUYS J**

**MAGISTRATE'S COURT CASE NUMBER: 271/98**

In the review proceedings in the case between

**HARDUS OTTO**

Applicant

and

**PIET KOLOBE**

First Respondent

**BEN THIPE**

Second Respondent

**SAMUEL MATLE**

Third Respondent

**ANDRIES THAMAGA**

Fourth Respondent

**JOHANNES POEE**

Fifth Respondent

**PETRUS MOTSUMI**

Sixth Respondent

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## JUDGMENT

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**GILDENHUYS J:**

[1] This matter came before the Court by way of automatic review in terms of section 19(3) of the Extension of Security of Tenure Act<sup>1</sup> (hereinafter “the Tenure Act”).

[2] The applicant applied in the Magistrate’s Court for the district of Coligny for an eviction order against six respondents. All six respondents worked for him in the past and they have lived on his farm since before 4 February 1997. The matter was first heard in the Magistrate’s Court on 1 December 1998. Mr Ramphela appeared for the respondents. On that date, no answering affidavits were filed. The Magistrate gave an order as follows:

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<sup>1</sup> Act No 62 of 1997.

“Respondente geleentheid gebied om binne 15 dae vanaf vandag die beantwoordende eedsverklarings te liasseer en aan applikante te verskaf.

Uitstel *sine die*.

Kostebevel oorgehou tot by afhandeling.”

[3] The next hearing in the Magistrate’s Court was on 26 January 1999. By that date, still no answering affidavits had been filed. This time Ms Moleleke appeared for the respondents. Ms Moleleke made a submission, which the Magistrate recorded (in cryptic notes) as follows:

“Received a notice of set down on 8-1-99. Matter postponed *sine die*, the submission is that today is the date that the Court should give a date to respond, otherwise the applicant will have too much time to look at the documents. The affidavits of our clients will deny almost everything in the affidavit of Mr Otto (the applicant).”

[4] Mr Louw, for the applicant, opposed the application for postponement. He submitted, in argument, that he had discussions with respondent’s attorneys during the period between the first and second hearings. According to the Magistrate’s notes, Mr Louw described the attitude of the respondents (as it became apparent during the discussions) to be as follows:

“Respondent se houding dat as gevolg van *sine die* uitstel vandag ’n datum moes wees om ’n tyd vir liassering te gelas.”

[5] It is clear that Ms Moleleke was at all relevant times under the impression that the purpose of the second hearing was to fix a time limit within which the answering affidavits had to be filed. How she gained that impression I do not understand, particularly because at the first hearing the Magistrate gave the respondents an opportunity to file answering affidavits within a stated period of 15 days. Mr Louw suggested that it was a deliberate manoeuvre to gain time. If so, this would comprise a serious impropriety by an officer of the Court. I am not convinced that Ms Moleleke’s conduct constituted a deliberate or dishonest strategy. I am, however, of the view that the misinterpretation by Ms Moleleke of the first court order does appear to be indicative of ineptness, if not serious neglect. Although Ms Moleleke did not represent the respondents at the

first hearing, it was her duty to appraise herself of the content and effect of the order which the Magistrate made on that date.

[6] At the second hearing, the Magistrate did not accede to Ms Moleleke's request for a postponement. The matter was then argued on the basis of the allegations contained in the founding affidavits. After argument, the Magistrate gave an eviction order.

[7] There are many prerequisites which have to be fulfilled before an eviction order under the Tenure Act can be granted. In the affidavits filed on behalf of the applicant, allegations were made to indicate that these prerequisites had been complied with. I make no finding as to whether or not these allegations sufficed to comply with the prerequisites. Fact is, the respondents did not file answering affidavits, in all probability as a result of the ineptness or neglect of their attorney. The respondents were fully entitled to rely on their attorney for the conduct of the litigation.<sup>2</sup> The Tenure Act is social legislation and eviction orders under that Act must not be lightly given. The consequences could be severe. The Court must ensure that justice is achieved. The Magistrate only had the applicant's version of the facts before him on 26 January 1999. To have denied the respondents a further opportunity to file answering affidavits, as the Magistrate has done, because their attorney did not know or understand the contents of the first Court Order, is not in the interests of justice. Consequently, the eviction order which the Magistrate eventually made, cannot stand.

[8] I must add that it will not always be possible for litigants to shelter behind the ineptness or neglect of their legal representatives.<sup>3</sup> Each case must be judged on its own merits.<sup>4</sup> There may

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<sup>2</sup> In the case of *Webster and Another v Santam Insurance Company Ltd* 1977 (2) SA 874 (A) at 883G, Kotzé JA held:

“A lay client, like each of the appellants, is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Ordinarily he places considerable reliance upon the competence, skill and knowledge of an attorney and he trusts that he will fulfil his professional responsibility.”

<sup>3</sup> In *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141B, Steyn CJ held:

“There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered . . .”

<sup>4</sup> In *Rose and Another v Alpha Secretaries Ltd* 1947 (4) SA 511 (A) at 519, Tindall JA held:

“It seems to me undesirable to attempt to frame a comprehensive test as to the effect of an attorney's negligence on his client's prospects of obtaining relief under Rule 12 or

well be cases where the interests of the other parties will require a litigant to suffer the consequences of ineptness or neglect on the part of his or her legal representative. The Court may also visit such ineptness or neglect with an adverse costs order, which in suitable cases could be made *de bonis propriis*.<sup>5</sup>

[9] Because the Magistrate who made the second Court Order has formed an opinion that the evidence contained in the founding affidavits is sufficient to satisfy the requirements of the Tenure Act for an eviction order, it is recommended that any future hearing of the matter be before a different magistrate.

[10] The Court orders that:

- (a) the order which the Magistrate: Coligny made on 26 January 1999 for the eviction of the respondents and for costs, be and is hereby set aside in whole;
- (b) the order which the Magistrate: Coligny made on 26 January 1999 in which he refused a postponement of the hearing, be and is hereby set aside and substituted by the following order:
  - (i) *the matter is postponed sine die;*
  - (ii) *the respondents may deliver answering affidavits by no later than 26 March 1999;*
  - (iii) *the applicant may, after receipt of the answering affidavits, deliver replying affidavits within the time limits laid down by the rules of the High Courts;*

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to lay down that a certain degree of negligence will debar the client and another degree will not. It is preferable to say that the Court will consider all the circumstances of the particular case in deciding whether the applicant has shown something which justifies the Court in holding, in the exercise of its wide judicial discretion, that sufficient cause for granting relief has been shown.”

<sup>5</sup> See the judgment of this Court in *Ntuli and Others v Smit and Another*, LCC27/99, 3 March 1999, as yet unreported, internet web site address: <http://www.law.wits.ac.za/lcc/1999/ntulisum.html> at para [25] to [31] and the cases referred to therein.

- (iv) *after the requisite affidavits have been filed, or after the time for their delivery has expired, the applicant may set the matter down for hearing in the Magistrate's Court, Coligny.*

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**JUDGE A GILDENHUYS**

**Handed down:** 12 March 1999