

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NUMBER:LCC8R/99

In Chambers: **BAM P**

MAGISTRATE'S COURT CASE NUMBER: 11379/98

In the review proceedings in the case between:

JACOB DE WET CONRADIE

Applicant

and

ANDRE HANEKOM

First Respondent

MARY HANEKOM

Second Respondent

JUDGMENT

BAM P:

[1] This is a matter which was placed before the Land Claims Court in terms of section 19(3) of the Extension of Security of Tenure Act¹ (hereinafter referred to as “the Act”) by the additional Magistrate of Worcester on 18 February 1999. Subsequently and by consent between the legal representatives of the parties, submissions from them were filed with the Court by the Respondents on 3 March 1999 and then by the Applicant on 9 March 1999.

[2] The submissions raised various substantial issues of procedure and of content and since the Magistrate had ordered eviction to take place on 16 March 1999, the Court telephoned the legal representatives of the parties as well as the Magistrate to suspend the date by agreement until such time as the review process could be completed. The Court simultaneously requested the Magistrate for reasons for judgment, which were received on 23 March 1999.

1 Act 62 of 1997.

[3] The Court would have wished for more time to deal with the various issues raised by the attorneys and the Magistrate in some detail and in an effort to bring a measure of clarity in respect of them. However, the Registrar of this Court has brought to my attention a letter from the Applicant's attorney indicating that they cannot extend the suspension any longer and intend taking further steps. In consequence, I am compelled to deal with the matter hurriedly in a condensed form and merely make my findings in staccato without elaborating.

[4] The Applicant, Jacob De Wet Conradie, the owner of the farm Kanetvlei, De Doorns, seeks to evict the first Respondent, Mr Andre Hanekom, and his wife, Mrs Mary Hanekom, the second Respondent, from the farm.

[5] Both the Respondents were 'occupiers' as defined in the Act as on 4 February 1997 and live together in a house provided by the Applicant. Both the Respondents were previously in the employ of the Applicant but the first Respondent was dismissed on 4 August 1998, while the second Respondent is still in employment.

[6] The Applicant wants them both out of the house on the farm because he avers it was an express condition of their contracts that they could only continue living in the house for as long as both were in his employment. Now that the first Respondent's employment has been terminated, both must vacate the house in terms of the agreement.²

[7] What is abundantly clear though is that the Applicant cannot tolerate the first Respondent's continued occupation of the house which is by virtue, not only of his previous status as employee, but also by virtue of his being the spouse of the second Respondent. The reason for his intolerance, he avers, is that the first Respondent has in the past and on several

2 It appears from submissions that the agreement was verbal.

occasions conducted himself in such a reprehensible manner as to justify the granting of an order for his eviction in terms of the provisions of section 10(1)(a) and (c) of the Act.

[8] Subject to the other provisions of the Act, section 10(1)(a) provides that an eviction order against an occupier may be granted if the occupier has breached section 6(3) and the Court is satisfied that the breach is *material* (my emphasis) and that the occupier has *not remedied such breach* (my emphasis). Section 6(3) provides that:

“An occupier may not-

- (a) intentionally and unlawfully harm any other person occupying the land;
- (b) intentionally and unlawfully cause material damage to the property of the owner or person in charge;
- (c) **engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or**
- (d) enable or assist unauthorised persons to establish new dwellings on the land in question.”

[9] Section 10(1)(c) also provides for the granting of an order for eviction if: “the occupier has committed *such a fundamental breach of the relationship between him or her and the owner or person in charge* (my emphasis), that it is not *practically possible* (my emphasis) to remedy it, either at all or in a manner which could reasonably restore the relationship”.

[10] The Applicant’s complaint/grievance is set out in clear terms in his affidavit as follows:

“Op 4 Augustus 1998 is die Eerste Respondent se dienskontrak wettig beëindig deurdat hy by ’n dissiplinêre verhoor skuldig bevind is aan drie aanklagte van aanranding wat op die plaas plaasgevind het en daarna ontslaan is. Sy appél is op 6 Augustus 1998 van die hand gewys. Die Eerste Respondent is juis ontslaan omdat hy ander persone op die plaas aangerand het en probleme oor naweke op die plaas veroorsaak het. Eerste Respondent het ook reeds vorige veroordelings vir soortgelyke geweldsmisdrywe wat op die plaas gepleeg is, gehad. Eerste Respondent het deur sy optrede derhalwe die bepalings van Artikel 6(3) van Wet 62 van 1997 verbreek deurdat hy ’n ander persone wat die grond okkupeer opsetlik en onwettig benadeel het. Die vertrouensverhouding tussen my en die Eerste Respondent het weens sy gemelde optrede tot so ’n mate verbrokkel dat dit nie vir my prakties moontlik is om hom enigsins meer op die plaas te laat aanbly nie en is daar geen manier waarop die verhouding tussen Eerste Respondent en ander okkupeerders of myself weer herstel kan word nie. Ek wens derhalwe die Agbare Hof te versoek om kragtens die bepalings van Artikel 10 van Wet 62 van 1997 ’n Bevel te verleen waarkragtens Eerste Respondent uitgesit word van die woonhuis wat hy tans op die plaas bewoon”

[11] The Applicant has furthermore filed affidavits to confirm the first Respondent's propensity to violent conduct. The one is a deposition by Mr Jan Engelbrecht who testifies that on 23 January 1999 (almost six months after the dismissal), the first Respondent threatened him with a knife.³ The other is a deposition by Mr Herman Schoeman, the farm manager ("plaasbestuurder"), who refutes certain assertions in an affidavit made on behalf of the first Respondent and recites three previous incidents, going back to July 1997, for which the first Respondent faced disciplinary hearings and was found guilty of assault.

[12] Towards the end of September 1998, the Applicant issued notices in terms of section 9(2)(d) of the Act to the Respondents, to the Provincial Director of the Department of Land Affairs in the Western Province and to the Municipality of Worcester advising them of his intention to obtain an order for the eviction of the Respondents. The grounds upon which the eviction order was to be brought were therein set out as follows :

"Die gronde waarop die uitsettingsbevel aangevra sal word is as volg:

U verblyfreg spruit slegs voort uit die diensooreenkoms met u werkgewer.

U is na behoorlike dissiplinêre verhoor afgedank uit die diens van MNR DE WET CONRADIE op 6 AUGUSTUS 1998

U is skriftelik kennis gegee op 6 AUGUSTUS 1998, na u afdanking om die eiendom te ontruim op 7 SEPTEMBER 1998."

[13] On either 23 or 26 November 1998,⁴ the Applicant filed a Notice of Application with the Clerk of the Civil Court for an order for eviction against the Respondents and annexed the affidavit of the Applicant in support thereof. In that affidavit, the Applicant prayed for eviction

3 At paragraph 5 of Jan Engelbrecht's affidavit:

"Hy het 'n mes uitgehaal en het die lemkant teen my keel vasgedruk vir 'n hele tyd lank. Hy het ook aan my gesê "Sê nog net een woord".

4 Both dates appear on the stamp of the Clerk of the Court.

of the first Respondent in terms of section 10 of Act 62 of 1997 on two grounds,⁵ and for the eviction of the Second Respondent upon grounds set out as follows:

“Indien die Tweede Respondent nog in die huis aanbly sal dit beteken dat die Eerste Respondent nog steeds die plaas oor naweke sou kon besoek, wat ’n potensieel gevaarlike situasie vir ander werkers se persone en eiendom daarstel. Uit die aard van die saak sal sodanige situasie ook alle dissipline wat ek as werkgewer op die plaas moet handhaaf tot ’n groot mate ondermyn. Ek wens derhalwe aan te voer dat dit slegs billik en redelik is dat die Tweede Respondent se verblyfreg op die eiendom ook beëindig word en dat die Hof ook ’n uitsettingsbevel ten opsigte van haar verleen. Ek is bereid om alternatiewe akkomodasie op die plaas aan die Tweede Respondent te verleen waar sy ’n woonhuis saam met ander persone sal moet deel, maar glo ek dat dit nie ’n wenslike uitweg is nie, aangesien die Eerste Respondent dan nog steeds die plaas sal kom besoek en onenigheid en onmin tussen die werkers sal veroorsaak.”

[14] I pause at this point to make the following observations :

- (a) In the grounds set out in the section 9(2)(d) notices, no distinction was made between the Respondents, though the stated grounds clearly applied only to the first Respondent;⁶

5 Which are engaging in conduct which threatens or intimidates other who lawfully occupy the land or other land in the vicinity and that he has committed such a fundamental breach of the relationship between him. . . and the owner. . . that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.

Section 10(1) of the Act reads as follows:

“An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-

- (a) the occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
- (b) ;
- (c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or
- (d)”

6 Supra par [12].

- (b) The grounds set out in the Applicant's affidavit differ from those set out in the section 9(2)(d) notices and a distinction is now made in the affidavit between the two Respondents.

[15] One of the prerequisites to an eviction order is that the occupier's right of residence must have been terminated. Section 8(1) provides that an occupier's right of residence may be terminated on any lawful ground if such termination is just and equitable having regard particularly 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)
- (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.”

The Magistrate appears to have confined himself mainly to the element in (b), namely the conduct of first Respondent, and to have accepted the fairness of the agreement in (a), without further examination especially as regards the second Respondent. He states his position in respect of the first Respondent as follows:

“Artikel 8(1)(b) van ESTA: Die eerste Respondent het voorgekom in 'n dissiplinêre verhoor ingestel volgens die Arbeidsreg. Dit was sy tweede oortreding en ontslag is aanbeveel. Die hof verstaan dat sy appél ook van die hand gewys is. Die hof het die verklaring van Jan Engelbrecht in aanmerking geneem en bevind dat die eerste respondent 'n aggressiewe persoon is wat maklik tot geweld oorgaan. Dit is die bevinding van die hof dat hy 'n gevaar vir al die ander plaaswerkers is, spesifiek die werkers wat oor hom toesig moet hou. Die hof was tevrede dat sy ontslag korrek aanbeveel is. Hierin lê vir die hof die kruks van die beëindiging van sy verblyfreg.”

In respect of the second Respondent, the Magistrate finds as follows:

“Die situasie met die tweede respondent is heeltemal anders. Die gronde vir haar uitsetting is slegs daarop gebaseer dat sy getroud is met die eerste respondent. Verder behels die ooreenkoms tussen applikant en respondente dat albei se verblyfreg op die plaas daarvan afhanklik is dat albei op die plaas werksaam moet wees omdat die wooneenhede optimaal benut moet word. Dit word nou betoog dat omdat die man se verblyfreg beëindig is, die vrou (eggenote) s’n ook beëindig moet word. Die hof kon nêrens gesag of leiding hieroor kry nie. Die bestaan van hierdie ooreenkoms word egter nie betwis nie. Gevolglik het die hof ook uitsetting van die tweede respondent gelas.”

[16] As a matter of fact, the fairness of the agreement as set out by the Applicant is questionable, because under that agreement the second Respondent could lose her right of residence through the conduct of the first Respondent.

[17] Section 8(1)(c), interests of the parties, seems to have been considered by the Magistrate only in relation to the interests and comparative hardships to the owner and other occupiers and not at all in relation to the interests and comparative hardship to the Respondents.

[18] There is no averment or assertion in the papers concerning an effective opportunity for the Respondents to make representations in terms of section 8(1)(e), before the decision was made to terminate the right of residence. This may not be as important in the case of the first Respondent, who had the benefit of a disciplinary hearing, as it is in respect of second Respondent.

[19] Since section 10(1)(c) also applies, there should have been an examination of what precisely constituted the fundamental breach of the relationship between each of the Respondents and the Applicant that is not practically possible to remedy. This applies particularly in respect of the second Respondent. As far as the first Respondent is concerned, this particular concern is no longer relevant as he no longer works for the Applicant.

[20] In respect of the second Respondent, it is pointed out that she is an occupier in her own right and independently of her relationship to the first Respondent. Consequently, the grounds

for terminating her occupation cannot be equated or conflated with grounds for terminating the occupation of any one else, including her spouse.

[21] My findings are as follows :

- (i) I have considered the submissions made by the attorneys on both sides in respect of the procedures followed and the jurisdiction of the Magistrate's Court in respect of them. These matters were raised and resolved by this Court (per Dodson J) in the matter of *De Kock v Juggels and Another*.¹⁰

I do, however, feel a need to point out that Applicants who come to court relying on affidavits run the risk that the emergence of material factual disputes or the failure to make all the necessary averments could make it difficult for the Court to decide wherein lies the preponderance of probabilities. In the *De Kock* case quoted above the Court (per Dodson J) stated the following :

“A person who seeks the eviction of an occupier under the ESTA [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 is justified.”¹¹

- (ii) The requirements of the Act for the eviction of the First Respondent have been substantially complied with. An eviction order against him will, however, be meaningless, because if evicted he will be entitled to return as a family member of the second Respondent.

10 LCC7R/99, 11 March 1999, <http://www.law.wits.ac.za/lcc/1999/dekocksum.html>.

11 Ibid at par [13]. See also *Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC) at 1019D; [1998] 3 All SA 625 (LCC) at 630f.

- (iii) The grounds for eviction given in the section 9(2)(d) notices are inappropriate in respect of the second Respondent.
- (iv) The failure to distinguish between the circumstances pertaining to the two Respondents is clearly prejudicial to her constitutional rights and rights conferred on her by the statute. Furthermore, the grounds upon which the application for her eviction is based are not supported by any provision in the Act.
- (v) The factors enumerated under section 8(1)(a), (b) and (c) have not been given proper attention as far as the second Respondent is concerned. Section 8(1)(d) is irrelevant.
- (vi) There are no averments in the papers that the second Respondent was granted an effective opportunity to make representations before the decision was made to terminate their rights of residence in terms of section 8(1)(e) of the Act.
- (vii) The second Respondent is entitled to family life as a component of her right of residence on the farm.¹² This could preclude an eviction order against the first Respondent.
- (viii) Insofar as the first Respondent no longer has the status as an occupier and can only be allowed onto the property because he is a family member of the second respondent, other remedies must be sought in respect of misbehaviour by the first Respondent.

12 Section 6(2)(d) of the Act.

[22] Accordingly I make the following order:

- (a) The eviction order against the first respondent is set aside and replaced by a declaratory order that the first respondent, in his own right, is no longer an occupier in terms of the Extension of Security of Tenure Act, and that any right to use the residence occupied by the second respondent derives from his family relationship with the second respondent;
- (b) The eviction order against the second respondent is set aside, and replaced by an order of absolution from the instance.

PRESIDENT F C BAM

Handed down on: 22 April 1999

For the Applicant:
Mr de Wet of De Wet & Stofberg Inc, Worcester

For the Respondent:
Mr R Wyngaard of Lawyers for Human Rights, Stellenbosch

