

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In Chambers: **BAM P**

CASE NUMBER:LCC14R/98

MAGISTRATE'S COURT CASE NUMBER: 201/1998

In the review proceedings in the case between:

J P DE VILLIERS

Plaintiff

and

MRS MSIMANGO

Defendant

JUDGMENT

BAM P:

[1] This matter was brought before the Land Claims Court on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act (hereinafter referred to as ESTA)¹ by the Magistrate of Louwsburg in the district of Ngotshe, KwaZulu-Natal.

[2] The Plaintiff issued summons for the eviction of the Defendant from his farm in the latter half of 1998. In his particulars of claim, the Plaintiff relies on his ownership of the farm, and states-

“Die Verweerderes, haar familie, vee en goedere beskik oor geen verblyfreg op die Eiser se plaas nie, alternatiewelik is sodanige verblyfreg (die bestaan waarvan nie erken word nie) beëindig.”

[3] In paragraph 5 of the particulars of claim, however, it is stated that the Plaintiff has given notice to the Defendant in terms of ESTA. A copy of such notice is attached to the particulars. In that notice, the Defendant is further advised that a copy of it has been served on the Department of Land Affairs. Finally prayer (c) under the Plaintiff's particulars is in the following terms:

1 Act 62 of 1997.

“’n Bevel waarvan die Hof sal gelas dat indien die Verweerderes, haar familie, vee en goedere nie die plaas verlaat op die datum in die voorafgaande smeekbede genoem nie, hierdie uitsettingsbevel uitgevoer mag word op ’n verdere datum bepaal te word deur die Agbare Hof *in terme van die bepalings van Artikel 12 van die Wet op Uitbreiding van Sekerheid van Verblyfreg Nr 62 van 1997; . . .*” (my emphasis)

[4] On 8 September 1998, a notice of appearance to defend was filed on behalf of the Defendant and receipt of it was acknowledged on the same day on behalf of the Plaintiff. Six days later, on 14 September 1998, a notice of application for summary judgment to be heard on 6 October 1998, was signed on behalf of the Plaintiff and receipt of it was acknowledged on behalf of the Defendant on 18 September 1998. The notice was accompanied by an affidavit by the Plaintiff confirming the cause of action as set out in the summons and expressing the belief that the Defendant did not have a *bona fide* defence and that she had entered appearance solely for purposes of delay. In the same notice of application (at par 3 thereof) the Plaintiff again prayed for the eviction order to be ‘*effected in terms of section 12 of the Extension of Security of Tenure Act No 62 of 1997*’.

[5] The application was heard on the appointed day with no further ado and the entire proceedings are recorded as follows:

“OP 6/10/1998

SAAK 201/1998

VOOR G. I. KRUGER

Om 10:50

Namens applikant Me C. Gray.

Geen ander verskynings nie.

Ansoek om summiere vonnis.

Me Gray; geen opponerende verklarings is geliaseer nie. Versoek dat die aansoek om vonnis toegestaan word.

UITSPRAAK.

Uitsettingsbevel teen verweerderes, haar familie, besittings en lewende hawe vanaf die plaas, Uitval, distrik Ngotshe toegestaan. Verweerder word gelas om die betrokke plaas voor of op 20/11/1998 te verlaat: indien aan voorgaande nie voldoen word nie word die bevel van krag op 1/12/1998.

Verder word koste van aansoek t.g.v. applikant toegestaan.

G. I. KRUGER
 LANDDROS
 6/10/1998"

[6] Although there is no mention of ESTA in the record of proceedings as set out in the above paragraph, the Magistrate nonetheless forwarded, rightly so in my opinion, the proceedings to this Court for automatic review in terms of section 19(3) of ESTA.

[7] It appears to me that the Plaintiff might have been under the impression that it was possible to utilise the common law for obtaining the eviction order itself and then the ESTA provisions for implementation and for setting the date of execution.

[8] In my view, this cannot be done. Although the Magistrate has jurisdiction both in terms of the common law and in terms of ESTA, he must, depending on the circumstances, make his order in terms of the one or the other.

[9] In the circumstances of this case, the Magistrate was obliged to apply ESTA by reason of the Plaintiff's requests as set out in paragraph [3] above, the combined effect whereof was to concede that the action fell within the ambit of ESTA. Once that concession was made, it became incumbent upon the Magistrate to be satisfied that there has been compliance with all the relevant provisions of ESTA.

[10] In order to be thus satisfied, the Magistrate must at least have ascertained whether the prerequisites for obtaining an eviction order under ESTA had been met. The prerequisites for obtaining an eviction order are summarised in section 9(2).² There are four of these requirements:

- (i) The occupier's right of residence must have been terminated in terms of section 8. This section sets out numerous criteria for establishing whether a termination was just and equitable.
- (ii) The occupier had not vacated the land within the period of notice given by the owner or person in charge. In the present case, this was common cause.

² See *Karaba and Others v Kok and Others* 1998 (4) SA 1014 (LCC) at 109D-1020D, [1998] 3 All SA 625 (LCC) at 630f-631d.

- (iii) The conditions for an order of eviction in terms of section 10 or 11 have been complied with.
- (iv) Two calendar months' written notice of the owners intention to obtain an eviction order has been served on the occupier, the municipality within whose area of jurisdiction the land in question is situated, and the head of the relevant provincial office of the Department of Land Affairs.

[11] In the record of proceedings, information exists only in respect of (ii) and, to a limited extent, in respect of (iv) of these requirements. It is clear that the Defendant has not vacated the land and it is clear that written notice of intention to obtain an eviction order has been served on the Defendant and perhaps³ on the Department of Land Affairs. There is no indication whether the notice was served on the municipality, nor, for that matter, whether the farm falls within the area of jurisdiction of a municipality.

[12] Once the Plaintiff accepts that ESTA is applicable, the Plaintiff must prove that he has complied with the provisions of ESTA for an eviction order. The Plaintiff has not done so. In particular, there is no indication of compliance with either section 10 or 11 (whichever of the two sections is applicable).

[13] Summary judgment is a procedure that is designed to minimise fanciful defences once the Plaintiff has clearly made out his claim. The plaintiff has not done this. Erasmus stated as follows:

“Where *ex facie* the document upon which the claim is founded there appears a defect in the cause of action, the court must refuse to enter summary judgment whether or not the defendant has filed an affidavit to oppose it.”⁴

[14] In all the circumstances set out in the above paragraphs, the Court orders:

3 There is no proof of service in this regard, apart from the Plaintiff's statement that service was effected.

4 Erasmus et al, *Superior Court Practice*, Service 8 (Juta & Co Ltd, Cape Town 1997) at B1-219.

The judgment of the Magistrate granting an order for the eviction of the Defendant and for costs, is hereby set aside in full

PRESIDENT F C BAM

Handed down on: 6 May 1999