

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NUMBER: LCC22R/99

In Chambers: **GILDENHUYS J**

MAGISTRATE'S COURT CASE NUMBER: 550/99

In the review proceedings in the case between:

DENLEIGH FARMS First Plaintiff

RENEE STUBBS Second Plaintiff

and

MANDLA JOHN MHLANZI First Defendant

LIZZIE MHLANZI Second Defendant

MOLLY MHLANZI Third Defendant

DUMISANI MHLANZI Fourth Defendant

MTIMA MHLANZI Fifth Defendant

JUDGMENT

GILDENHUYS J:

[1] The first plaintiff is the registered owner of immovable property commonly known as Denleigh Farm, in the district of Lions River (hereinafter “the farm”). The second plaintiff (who is also a director of the first plaintiff) hires the farm from the first plaintiff and is the person in charge of the farm. The first defendant was an employee of the second plaintiff. The first defendant worked on the farm and live on the farm together with the second defendant (his wife) and the other defendants (his children). The first defendant is an occupier of the farm within the meaning given to that term in section 1(1) of the Extension of Security of Tenure Act (hereinafter referred to as “ESTA”).¹

1 Act 62 of 1997, as amended.

[2] The first defendant voluntarily resigned his employment. Following upon the resignation, the second plaintiff gave the defendants written notice of the termination of their right to reside on the farm and to vacate the farm. Because the right of residence of first defendant arose solely from his employment agreement and the right of residence of the other defendants arises from their family relationship with first defendant, I am satisfied that the termination thereof is permitted under section 8(2) of ESTA.

[3] The plaintiffs, in a summons served on the defendants, prayed for their ejectment from the farm. None of the defendants entered an appearance to defend. Just over two months after the summons was served, an eviction order was granted by default in the Magistrate's Court of Howick.² The defendants were ordered to vacate the farm by 31 July 1999, failing which the plaintiffs would be entitled to issue a warrant of ejectment. The Magistrate did not require the plaintiffs to inform the defendants of the date when they must vacate the farm. He should have done so, because the defendants cannot be expected to obey the eviction order if they do not know of it. The eviction order made by the Magistrate came before me on automatic review in terms of section 19(3) of ESTA.

[4] The requirements for an eviction order are set forth in section 9(2) of ESTA. This section reads as follows:

“(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,

2 The judgment of the Magistrate containing the eviction order is not dated. It must have been given on or after 31 May 1999, because the request for default judgment is dated 31 May 1999.

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 court has, after the termination of the right to 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."

[5] As I have indicated above, the defendants' right of residence has been terminated. It is common cause that the defendants have not vacated the farm. The requirements of section 9(2)(a) and (b) of ESTA have therefore been complied with. Section 9(2)(c) of ESTA requires compliance with the conditions for an order for eviction in terms of section 10 or section 11. Section 10 relates to the eviction of a person who was an occupier on 4 February 1997, whilst section 11 relates to the eviction of a person who became an occupier after 4 February 1997. The defendants resided on the property since late 1986 or early 1987. It is alleged in the summons that the first defendant voluntarily resigned his employment, and that his right of residence arose solely from his employment agreement. An eviction order is therefor competent under section 10(1)(d). This constitutes compliance with section 9(2)(c).

[6] I now turn to the requirements of section 9(2)(d) of ESTA. Section 9(2)(d) requires certain notices to be given to the defendants, to the municipality concerned and to the head of the relevant provincial office of the Department of Land Affairs. The contents of these notices, and the manner in which the notices must be served, are prescribed under regulations which came into force on 18 December 1998 (hereinafter referred to as "the regulations").³

[7] In their summons, the plaintiffs alleged that the prescribed notices will be served simultaneously with the summons. Annexed to the summons are copies of notices in terms of section 9(2)(d)(i) of ESTA, addressed to the first three defendants in the English and Zulu languages. The fourth and fifth defendants are children under the age of eighteen and their names, as is permitted under the regulations, appear on the notice to the first defendant. Also annexed to the summons are copies of

3 The regulations are contained in Government Notice No 1632 in Government Gazette No 19587 of 18 December 1998.

notices to the chief executive officer of the Howick Transitional Local Council⁴ and to the provincial director of the Department of Land Affairs.⁵ A return from the Deputy Sheriff of the Court, Howick, states that the particulars of claim and all the annexures [which include the section (9)(2)(d) notices] were served on 29 March 1999 on the first defendant personally and on the other defendants by handing a copy of the summons and annexures to the first defendant. There is no proof of service on the Transitional Local Council or on the Department of Land Affairs.

[8] In terms of the regulations, certain portions of the prescribed notices must be highlighted. Copies of the notices must be served by the Sheriff⁶ on the occupiers personally, except where the Sheriff is unable to effect personal service, in which event different forms of service are permitted.⁷ In the case of personal service, the Sheriff must read out the highlighted portion of a copy of the notice to the occupier, which copy must be in the official language which the occupier understands best. Thereafter a copy of the notice in that language and another copy of the notice in another official language must be handed to the occupier.⁸ Where a different manner of service is employed (which could be by leaving the notices at the occupier's place of residence with a person apparently in charge of the premises) there must also be two copies, one in an official language which the occupier is reasonably believed to understand best, and the other in a different official language.⁹ The sheriff must, when presenting proof of service, indicate that the requirements of the regulations concerning the manner of service of the notices have been complied with, particularly relating to choice of language and reading out the highlighted portions. Each discrete requirement must be dealt with separately.

4 Given in terms of section 9(2)(d)(ii) of ESTA.

5 Given in terms of section 9(2)(d)(iii) of ESTA.

6 Regulation 9(2).

7 Regulation 9(4).

8 Regulation 9(2).

9 Regulation 9(4).

[9] It is permissible, under the proviso to section 9(2)(d) of ESTA, to dispense with service of the notices if the eviction application (which term includes a summons for eviction) has, after the termination of the right of residence, been served on the occupier, the municipality and the Department of Land Affairs not less than two months before the commencement of the hearing of the application. Because the summons in this case was served on 29 March 1999 and the request for default judgment was only made on 31 May 1999, the requisite two month period had elapsed.¹⁰ It was therefor not necessary to serve the prescribed notices on the defendants. I would have disregarded the notices annexed to the summons, had it not been for an inaccurate and misleading statement contained therein. I will now proceed to deal with that statement.

[10] The notices to the occupiers in terms of section 9(2)(d)(i) of ESTA which have been annexed to the summons in this case, contain the following paragraph under the heading “more information”:

“The court hearing the matter will be either the magistrate’s court in your area, or the Land Claim’s Court in Randburg (Gauteng) or, if you agree, the provincial division of the High Court responsible for the area in which you are staying. The owner or person in charge must ensure that you are told when and where the case will be heard.”

[my emphasis]

This paragraph was included because it forms part of the form prescribed under the regulations.¹¹ Unfortunately, the last sentence is inaccurate and misleading. It is inaccurate because legal process containing prayers for eviction will usually not indicate the date and place where the case will be heard. Unless the defendant has taken formal steps to defend the proceedings, he or she will, despite what is stated in the notice, not be informed of the date when and venue where the case will be heard. The statement is also misleading, because it could lull the defendant into not delivering a formal notice to defend or to participate after the process initiating the proceedings had been served, in the mistaken belief that there will be an opportunity to defend when the case is heard.

10 See *Remhoogte Farms (Pty) Ltd v Mentoer*, LCC12R/99, 9 April 1999, as yet unreported, internet web site address: <http://www.law.wits.ac.za/lcc/lccalph.html> at para [14].

11 Form E, annexed to the regulations.

[11] If it was the intention of the Minister of Land Affairs to impose a future obligation on a landowner or person in charge bringing eviction proceedings against an occupier to inform the occupier when and where the case will be heard,¹² one would have expected that obligation to have been imposed explicitly in the regulations, and not circuitously through a statement to that effect in a prescribed form. The notification of dates of hearing forms part of the civil procedure of the courts concerned. It is doubtful whether the Minister of Land Affairs has the necessary authority to impose additional obligations on a plaintiff in the conduct of legal proceedings for eviction,¹³ assuming that it had been the Minister's intention to do so. Even if an occupier had been informed when and where the eviction proceedings will be heard, that occupier will not be entitled to participate in the hearing if he or she has not timeously delivered a notice to defend or to participate.¹⁴ It is recommended that the Minister give consideration to amending the prescribed form for notices to occupiers so as to remove the statement that an occupier will be told when and where the case will be heard, and to replace it with a statement that legal process commencing proceedings against the occupier might be served on the occupier and that if the occupier wants to defend those proceedings, a formal notice to defend or to participate must be delivered.

[12] For as long as the present prescribed form of notice continues to read as it does, and so as not to mislead an occupier, the statement that the occupier will be informed of the date and place of hearing should preferably be omitted from the notice. If it is retained, the landowner or person in charge must accept the additional burden of informing the occupier (also if the occupier does not defend the proceedings) when and where the matter will be heard. It will, in most instances, not be possible to give a date of hearing at the stage when the process commencing the case is served. An additional notice will then have to be given at a later stage. In the present case, the defendants received a notice containing a statement that they will be informed of the date and place of hearing

12 The obligation must necessarily be a future obligation. It is very unlikely that the date of hearing will be known at the time when the section 9(2)(d)(i) notice is served.

13 The power of the Minister of Land Affairs to make regulations is derived from section 28(1) of ESTA. This does not include the power to prescribe the conduct of court proceedings.

14 It could hardly have been the intention of the legislature to require notification of the date and place of hearing to be given to occupiers just to enable them to apply for condonation for not timeously delivering a notice to defend or to participate, or to inform themselves as from what date they might be ordered to vacate the land.

of the case. In all likelihood they were not informed when and where the application for default judgment would be heard. This could have prejudiced them.

[13] In terms of section 9(2)(d)(ii) and (iii) of ESTA, notices must also be served on the municipality in whose area of jurisdiction the land in question is situated and on the relevant provincial office of the Department of Land Affairs. Copies of notices to them have been annexed to the summons, in the English and Zulu languages, notwithstanding that two languages are not required for notices under sections 9(2)(d)(ii) and (iii).¹⁵ There is, however, no evidence in the papers before me that these notices or the summons were actually served on the municipality or on the Department of Land Affairs. There is also the additional circumstance that notice of the hearing of the application for default judgment might not have been given to the occupiers.¹⁶ Therefore, the default judgment cannot stand.

[14] For the reasons set out above, the Court makes the following order:

- (a) the default judgment granted by the Magistrate is set aside in whole;
- (b) the matter is remitted to the Magistrate to decide on any fresh application for default judgment which the plaintiffs may bring, having regard to the contents of this judgment.

JUDGE A GILDENHUYS

Handed down on: 25 June 1999

15 Regulation 9(6).

16 Usually notice of the date and place of hearing of an application for default judgment need not be given to defendants who have not delivered formal notices to defend or to participate. In this case, notice to the occupiers should have been given only because it has been intimated to them in the section 9(2)(d)(i) notices that they will be informed of the date and place of hearing.

