

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

**RANDBURG**

**CASE NUMBER: LCCR67R/99**

In Chambers: **MEER J**

**MAGISTRATE'S COURT CASE NUMBER: 211/99**

Decided on 11 November 1999.

In the review proceedings in the case between:

**MARGARETHA ISABELLA VAN DER MERWE**

Applicant

and

**SIPHO MAPHODISA SAMUEL MADUNA**

1<sup>st</sup> Respondent

**JAN MADUNA**

2<sup>nd</sup> Respondent

**SAMUEL MPONDO**

3<sup>rd</sup> Respondent

**THYS MOFOKENG**

4<sup>th</sup> Respondent

**ALINA MEISIE MOKOENA**

5<sup>th</sup> Respondent

**SIMON BAITI MOFOKENG**

6<sup>th</sup> Respondent

**JOHANNES NTAOTE MOFOKENG**

7<sup>th</sup> Respondent

**WILLEM SEBOTSA**

8<sup>th</sup> Respondent

**BETTIE MOEKGO MOKOENA**

9<sup>th</sup> Respondent

**EMILY MKPONTFHO MOKOENA**

10<sup>th</sup> Respondent

**THABISO MOKOENA**

11<sup>th</sup> Respondent

**LINAH TSHOLO**

12<sup>th</sup> Respondent

**JENETTE THOKOZILE MADUNA**

13<sup>th</sup> Respondent

**EMMA MATSEKO MOKOENA**

14<sup>th</sup> Respondent

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## JUDGMENT

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**MEER J:**

[1] This judgment concerns a review in terms of section 19(3) of the Extension of Security of Tenure Act<sup>1</sup> (“The Act”) of an order by the magistrate, Lindley, evicting the respondents from the farm Bastiaan, Lindley, Free State. I will refer to the farm Bastiaan as “the farm”. On 11

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1 Act 62 of 1997

November 1999 I set aside the eviction order granted by the magistrate in its entirety. I indicated that my reasons would follow. My reasons are as follows:

**In contravention of High Court Rule 6(5) the magistrate erred in granting an eviction application brought on notice of motion which was not in accordance with form 2(a)<sup>2</sup>, the respondents were consequently not informed of their procedural rights and were prejudiced.**

[2] Section 17(4) of the Act provides that the rules of procedure applicable in civil actions and applications in a High Court shall apply in proceedings in a magistrate's court in terms of the Act, until rules of court for the magistrate's courts are made in terms of Section 17(3). Such rules have to date not yet been made. High Court rule 6(5)<sup>3</sup> provides that the notice of motion of all

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2 Contained in the first schedule to the High Court Rules.

3 Rule 6(5)(a) to (e) provide:

“(a) Every application other than one brought *ex parte* shall be brought on notice of motion as near as may be in accordance with with Form 2 (a) of the First Schedule and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given.

(b) In such notice the applicant shall appoint an address within eight kilometers of the office of the office of the registrar, at which he will accept notice and service of all documents in such proceedings, and shall, subject to the provisions of section 27 of the Act, set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether he intends to oppose such application, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice.

(c) If the respondent does not, on or before the day mentioned for that purpose in such notice, notify the applicant of his intention to oppose, the applicant may place the matter on the roll for hearing by giving the registrar notice of set down before noon on the court day but one preceding the day upon which the same is to be heard.

(d) Any person opposing the grant of an order sought in the notice of motion shall-

(i) within the time stated in the said notice, give applicant notice, in writing, that he intends to oppose the application, and in such notice appoint an address within eight kilometers of the office of the registrar, at which he will accept notice and service of all documents;

(ii) within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents; and

(iii) if he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.

(e) Within 10 days of the service upon him of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.

applications other than those brought ex parte must be in accordance with Form 2(a). This form, in addition to setting out the relief sought and specifying the supporting affidavit to be used, importantly informs the respondent of his/her procedural rights. It directs the respondent to notify the applicant in writing within 5 days after service upon him/ her of the application, whether he/she intends opposing the application, and of an address at which he/she will accept service of documents. It goes on to instruct the respondent to deliver an answering affidavit within 15 days thereafter, and specifies also that within 10 days of the service of respondent's answering affidavit, the applicant may deliver a replying affidavit. The form also states that failing notice of opposition, application will be made to court on an unopposed basis not less than 10 days after the service of the notice of motion upon the respondent. Form 2(a) is clearly the correct form to be used in an eviction application where the relief sought affects not only the rights of the applicant but very significantly those of the respondents themselves. It informs respondents both of their procedural rights and their right to be heard.

[3] In contravention of High Court rule 6(5)(a) the application for the eviction of respondents was brought on notice of motion in accordance with form 2<sup>4</sup> typically used in ex parte applications where a litigant approaches the court for relief affecting only his or her rights.<sup>5</sup> Although the notice of motion was addressed to the clerk of the court as well as to the respondents and was served upon them, it does not call upon the respondents to notify their intention to oppose the application and to provide a service address. Nor does it specify time frames for the furnishing of answering affidavits, or warn of the consequences of the failure to oppose, as occurs in a notice of motion based on form 2(a).

[4] The notice of motion is dated 30 September 1999 and simply states as follows:

“Geliewe kennis te neem dat daar op 19de Oktober 1999 om 9h00 of so spoedig doenlik as wat die partye aangehoor kan word, aansoek gedoen sal word by die hof namens die Applikant vir:

1. Uitsetting van die bogemelde Respondente en hul afhanklikes vanaf die plaas BASTIAAN, distrik Lindley.

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4 Contained in the first schedule to the High Court Rules.

5 High Court rule 6(2) provides that when relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion shall be addressed to both the registrar and such person, otherwise it shall be addressed to the registrar only.

2. Koste van die aansoek, indien die aansoek geopponeer sou word.
3. Alternatiewe regshulp.

Geliewe verder kennis te neem dat die eedsverklaring van Margaretha Isabella van der Merwe gebruik sal word ter staving van die aansoek.

GETEKEN TE LINDLEY OP HEDE DIE 30STE DAG VAN SEPTEMBER 1999.”

[5] The returns of services indicate that the application was served on the respondents on 4 October 1999. Respondents delivered neither notices of opposition nor answering affidavits, which is hardly surprising, given the absence of information pertaining thereto on the notices. Furthermore they did not attend court on 19 October 1999, (a mere 10 court days after service of the application), and the magistrate ordered their eviction in their absence despite the irregular notice of motion. I note that had the respondents been properly notified of their procedural rights in a notice of motion based on form 2(a), and had they elected to oppose the application, the matter would have been ready to be heard in about mid-November. The respondents have, in the circumstances, clearly been prejudiced by the use of the wrong form.

[6] There was no explanation by applicant as to why the form 2 notice of motion was used nor was there an application by her for condonation in terms of High Court rule 27(3)<sup>6</sup> for failure to comply with Rule 6(5). There was moreover not a hint of urgency in the application nor a request to the court to dispose of the matter on the grounds of urgency in accordance with High Court rule 6(12)(a) and (b)<sup>7</sup>. In the circumstances the magistrate ought not to have entertained the application. In *Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t /a Trend Litho; Consolidated Credit Corporation (Pty) Ltd v Van Der Westhuizen*<sup>8</sup> Coetzee J, as he then was, commented as follows on form 2(a):

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6 Rule 27(3) The court may, on good cause shown, condone any non-compliance with these rules.

7 Rule 6(12)(a) and (b) provide:

“(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.”

8 1978 (1) SA 779 (T)

“In addition it must be emphasized that Form 2(a) contains a description of the procedural rights of the respondent after service of the notice of motion. These rights are considerable and substantial. How could a Court, even if it were not a nullity, put a blue pencil through all these rights in the absence of the person in whom they reside and without notice to him that such an order which abrogates his rights might be made? This application is struck off the roll.”<sup>9</sup>

### **Non-compliance with Section 9(2)(a) and (b) of the Act**

[7] From the factual background contained in applicant’s affidavit it is clear that sections 9(2)(a) and (b) were not complied with and the order also stands to be set aside for this reason. The first to fourth respondents were employed on the farm as seasonal workers and the fifth to fourteenth respondents are their dependants. After the Easter weekend and between 9-11 April 1999 the first to fourth respondents refused to provide their services on the farm. They were given various written notices calling upon them to return to work immediately, failing which disciplinary action would be taken against them. The notices also informed them that their work contracts would terminate on the last day of August 1999, or when the cows were sold and the dairy operations had come to an end. On 1 June 1999 the first to fourth respondents signed written notices to the effect that they had voluntarily resigned from their employment as from 6 April 1999. Copies of such notices are annexed to the applicant’s affidavit.

[8] At no stage thereafter does the applicant state that respondents were informed that their rights of residence were terminated in terms of section 8(2) as a consequence of their voluntary resignations. This is requirement of section 9(2)(a). She fails also to state that they were given a period of notice to vacate the farm by the owner or person in charge as is required by section 9(2)(b). Before service of a notice under section 9(2)(d)(i) an applicant/plaintiff must establish that the respondent/defendant was called upon to vacate the farm but failed to do so.<sup>10</sup>

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9 *Simross Vintners* at 783G-784B

10 *Alberts v Sibiyi*, LCC66R/99, 4 November 1999, as yet unreported, at para [8].

[9] In compliance with section 9(2)(d)(i),(ii) and (iii) notices were given to the respondents, the requisite municipality and the head of the relevant provincial office of the Department of Land Affairs. Copies of the relevant notices are attached to applicant's affidavit.

[10] From the above I am satisfied that the magistrate should not have granted the eviction order, sections 9(2)(a) and (b) not having been complied with.

### **Failure of Applicant to show Locus Standi**

[11] The magistrate ought not to have granted an eviction order for a further reason, namely that the applicant has not shown that she had the requisite locus standi to bring the application for the eviction of the respondents. In paragraph 2 of her affidavit she states:

“Die plaas Bastiaan is geregistreer in die Retha Van Der Merwe trust. My eggenoot was tot op datum van sy afsterwe 'n trustee van die genoemde trust. Ek is tans nog 'n trustee van genoemde trust.”

[12] She is clearly not the owner of the farm nor does she state that she is the person in charge of the farm,<sup>11</sup> but states simply that she lives there. It appears from paragraph 17 of her affidavit that she is a “medetrustee”. As a joint trustee of the trust which owns the farm she requires a resolution by the trustees of the trust authorizing her to bring the application for the eviction of the respondents. No such resolution is provided. The magistrate thus erred in granting the eviction order also for the reason that the applicant failed to establish that she had the requisite locus standi.

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11 Sections 9(2)(b) and (d) refer to notice being given by the owner or person in charge

[13] In the circumstances I make the following order in terms of section 19(3)(b) of the Act:

The order for the eviction of the respondents granted by the magistrate for the district of Lindley in case no 211/99 is set aside in its entirety.

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JUDGE Y S MEER

For applicant:

GJ Janse Van Rensburg of Van Rensburg Prokureurs, Lindley.