

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

**RANDBURG**

**CASE NUMBER: LCC 44R/00**

In chambers: **GILDENHUYS J**

**MAGISTRATE'S COURT CASE NUMBER: 320/00**

Decided on: 07 July 2000

In the review proceedings in the case between:

**WESTMINSTER PRODUCE (PTY) LTD**  
**t/a ELGIN ORCHARDS**

Applicant

and

**SIMONS, J**

First Respondent

**SIMONS, R**

Second Respondent

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## JUDGMENT

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**GILDENHUYS J:**

[1] This matter comes before me on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act. I will refer to this Act as the "Tenure Act".<sup>1</sup>

[2] The applicant is the owner of Farm 312, Grabouw. The applicant has employed the first respondent as a farm worker, since 1993. The second respondent is the wife of the first respondent. The respondents were allowed to occupy a residence on the farm, on condition that their right of occupation would terminate when the employment contract ended.

[3] The first respondent is an occupier as defined in the Tenure Act. He voluntarily resigned his employment, but remains on the farm. His resignation was not a constructive dismissal.

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1 Act 62 of 1997.

[4] The applicant wants the respondents evicted from the farm. It took the steps required under section 9(2) of the Tenure Act for obtaining the requisite eviction order. The relevant parts of section 9(2) read 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,
- not less than two calendar months’ written notice . . .”

I am satisfied that the provisions of section 9(2) of the Tenure Act have been complied with.

[5] There was, however, no compliance with section 9(3) of the Tenure Act. Section 9(3) reads as follows:

- “For the purposes of subsection (2) (c), the Court must request a probation officer contemplated in section 1 of the Probation Services Act, 1991 (Act No. 116 of 1991), or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within reasonable period-
- (a) on the availability of suitable alternative accommodation to the occupier;
  - (b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any to education;
  - (c) pointing out any undue hardships which an eviction would cause the occupier; and
  - (d) on any other matter as may be prescribed.”

It is important to bear in mind that the report envisaged in section 9(3) is required *for the purposes of subsection 9(2)(c)*.

[6] Section 9(2)(c) of the Tenure Act requires compliance with section 10 or 11 of the Tenure Act before an eviction may be ordered. In this instance, section 10(1)(d) is applicable. It reads as follows:

- “(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted in-  
...  
(d) the occupier-
- (i) is or was an employee whose right of residence arises solely from that employment; and
  - (ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.”

[7] Section 10(1) of the Tenure Act does not require me to consider the availability of alternative accommodation, or to consider the hardship which an eviction order might cause, before granting such an order under any of the subsections of section 10(1). Consideration of these factors is required under other subsections of section 10 and of section 11.<sup>2</sup> Notwithstanding the use of the word “may” in the phrase *an order . . . may be granted*, a court must not refuse an order if the requirements contained in the applicable subsection of section 10(1) are met,<sup>3</sup> unless the refusal is for a reason permitted by law.

[8] In the preamble to the Tenure Act, it is stated that it is desirable that the right<sup>4</sup> of land owners to apply to court for an eviction order be recognised in appropriate circumstances. Section 10 and 11 of the Tenure Act set out various circumstances under which an occupier may be evicted. In some circumstances, factors are prescribed which a court must consider before granting an eviction order. In other circumstances, particularly those listed in section 10(1), no such factors are prescribed. One of the circumstances listed in section 10(1) is where the occupier has voluntarily resigned.<sup>5</sup> The equity is manifest: if the occupier’s right to occupation is linked to his employment, and the occupier, out of

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2 For example, sections 10(3)(a), 10(3)(ii), 11(3)(c) and 11(3)(e).

3 *South African Railways v New Silvertown Estate* 1946 AD 830 at 842: “But clauses couched in permissive language have often been construed as making it the duty of the person in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied.”

4 My emphasis. The recognition is that of a right, not a discretionary power.

5 Section 10(1)(d), quoted above at para [6].

his or her own volition, resigns that employment, why should the employer (land owner) continue to provide accommodation?

[9] In terms of section 26(3) of the Constitution<sup>6</sup>-

“(3) No one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

The decision in the Cape Provincial Division of the High Court in the matter of *Ross v South Peninsula Municipality*<sup>7</sup> lends support to the proposition that, despite any law which entitles a land owner to have a person evicted from his property, an eviction order may not be granted unless the court has considered “all the relevant circumstances”.

[10] Section 26(3) of the Constitution must, however, be interpreted consonant with section 26(1) and (2), which reads as follows:

“(1) Everyone has the right to have access to adequate housing.  
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

The obligation to provide access to adequate housing is an obligation imposed upon the State.<sup>8</sup> The right is subject to “progressive implementation”.<sup>9</sup> Where the State cannot provide housing, section 26(3) does not shift that obligation to private land owners.<sup>10</sup> On the other hand, land owners have responsibilities towards occupiers living on their land. For that reason, there are laws which curb the rights of a land owner to evict occupiers.

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6 The Constitution of the Republic of South Africa, Act 108 of 1996.

7 2000 (1) SA 589 (C).

8 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at 771H.

9 *Grootboom v Oostenberg Municipality and Others* [2000] 3 BCLR 277 (C) at 287A-B; *MEC for Business Promotion, Tourism & Property Management, Western Cape Province v Matthyse and Others* [2000] 1 All SA 377 (C) at 386h-j.

10 It was held by Moosa J in *MEC for Business Promotion* above n 9 at 387f:

“The special circumstances referred to in section 26(3) of the Constitution form an important adjunct to a fundamental right in the Constitution that everyone has the right to have access to adequate housing.”

[11] Section 26 of the Constitution deals separately with the State's obligation to implement the right to adequate housing, and with the right not to be evicted without an order of court made after considering all relevant circumstances. In my view, "relevant circumstances" are circumstances made relevant by law (either common law or statute law). It is not for the court which adjudicates on an application for eviction to determine subjectively what those considerations should be. If the State is the applicant for an eviction order, the extent to which the State has complied with its obligation to provide adequate housing may well be a relevant consideration of which the court must take cognisance. The position is not the same in the case of privately owned land, where the owner has no such obligation.

[12] In the matter of *MEC for Business Promotion*<sup>11</sup> Moosa J dealt with the question of what "relevant circumstances" include, and held:

"[25] What constitute relevant circumstances have not been defined. In my view it will depend on the facts of each particular case. In an unreported judgment of this Division: *Vanessa Ross v South Peninsula Municipality*, case A741/98,<sup>12</sup> the court, referring to relevant circumstances, said:

'Some guidance in this respect might be gleaned from the Prevention of Illegal Eviction from and Unlawful Occupation of Land, Act 19 of 1998.'

The relevant sections of the preamble to the Acts reads:

'And whereas no one may be evicted from their home or have their home demolished without an order of Court made after considering all relevant circumstances;

And whereas it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;

And whereas special consideration should be given to the rights of the elderly, children, disabled persons, and particularly households headed by women and that it should be recognised that the needs of those groups should be considered.'

The special considerations set out above could constitute relevant circumstances as envisaged in section 26(3) of the Constitution. The list is, however, not exhaustive."<sup>13</sup>

The examples given in *MEC for Business Promotion* and *Ross* all relate to circumstances made relevant by the law.

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11 Above n 9.

12 The judgment has now been reported. See above n 7.

13 Above n 9 at 385d-g.

[13] In an as yet unreported judgment in the case of *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*<sup>14</sup> Flemming DJP held that, in the absence of legislative authority -

“ . . . a court has no right to deviate from the South African law according to subjective perceptions of equity in a specific case. The law itself may cater for hardship or inequity or create a discretion so to cater.”<sup>15</sup>

The Tenure Act does cater for hardship and inequity. It specifies that the availability of alternative accommodation and the hardship which an eviction will cause, must be considered in some instances. They are not factors applicable to evictions under section 10(1) of the Tenure Act (which include evictions of employees who have resigned). Consequently, they cannot be “relevant circumstances” under section 26(3) of the Constitution.

[14] The matter was considered by Dodson J in *Pitout v Mbolane*,<sup>16</sup> where he stated:

“One may then ask what the purpose is of the report in circumstances where the owner relies only on section 10(1). It is certainly arguable that in these circumstances, the legislation does not envisage the requesting of a report because it would serve no purpose. On the other hand it may be argued that, notwithstanding section 10(1), section 26(3) of the Constitution requires a court to consider ‘all the relevant circumstances’ before ordering an eviction and the report is needed for this purpose anyway. The rejoinder to this may be that the right in section 26(3) of the Constitution has been subject to reasonable limitations in section 10(1) of ESTA which can be justified on the basis of section 36 of the Constitution. Fortunately, it is not necessary for me to decide this difficult issue. . .”<sup>17</sup>

[15] The Tenure Act puts flesh on the bones of the constitutional rights given under section 26(3). A court must observe the body of law thus created, unless and until it is held that a constitutional right is thereby curtailed to an extent which is not *reasonable and justifiable in an open and democratic society*.<sup>18</sup> No specific factors have been prescribed for consideration in circumstances envisaged in section 10(1)(d) of the Tenure Act. I cannot conceive of any factors which any law would, in this particular case, require the court to consider.

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14 Case number 1736/00, Witwatersrand Local Division, judgment delivered 28 April 2000.

15 Para 13.2 of the judgment.

16 [2000] 2 All SA 379 (LCC).

17 Above n 16 at para [20].

18 Section 36(1) of the Constitution.

[16] The South African judicial system is an adversarial system. The Tenure Act is social, or public interest, legislation. The very nature of the adversarial system, particularly where a matter is undefended, can prevent information reaching the court which the court should have before making an order under the Tenure Act. Section 9(3) of the Tenure Act provides a mechanism to get the requisite information to the Court. That, in my view, is the purpose of the section. It could not have been the intention of the legislature that the Court must ask for a report under section 9(3) where the information which it will contain, cannot possibly affect the right of the land owner to obtain an eviction order. This will be the case where the circumstances listed in section 10(1), apply unless some law requires otherwise, or unless the Minister prescribes other matters under section 9(3)(d) of the Tenure Act.

[17] It appears from the papers in this case that there are no children involved. The rights of children to education, as envisaged in section 9(3)(b) of the Tenure Act, cannot therefore be affected. No other matter listed in section 9(3) is, in my view, relevant to a decision in this particular case.

[18] Getting a report under section 9(3) will cause delay and expense. Where a report will lead to better informed court decisions, that is a price which must be paid. Where it is obvious that the report cannot possibly contribute information on any matter to be decided by the court, the legislature cannot have intended that the report must still be furnished. In those circumstances the requirement for a report can be dispensed with. Given the importance of occupancy rights, a court must be disinclined, in the absence of compelling grounds, to find that a report will be redundant.

[19] I find that the matters which have to be reported upon under section 9(3)(a) to (d) of the Tenure Act, as they presently stand, do not include the matters which must be considered by the Court before making an order for the eviction of the respondents under section 10(1)(d) of the Tenure Act. Consequently, there was no need to obtain a report.

[20] The order made by the Magistrate is hereby confirmed in full.

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**JUDGE A GILDENHUYS**

For the applicant:

*Mr G J Smith of Miller Bosman le Roux, Somerset-West*

The first respondent in person