

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NUMBER: LCC 68R/00

In chambers: **MOLOTO AJ**

MAGISTRATE'S COURT CASE NUMBER: 1135/00

Decided on: **** September 2000

In the review proceedings in the case between:

GARTMORE FARM (PTY) LTD

Plaintiff

and

NDLOVU, L P

First Defendant

NDLOVU, N

Second Defendant

NDLOVU, J F

Third Defendant

JUDGMENT

MOLOTO AJ:

[1] This is an automatic review in terms of section 19(3) of the Extension of Security of Tenure Act¹ (“ESTA”) of an order of the Magistrate, Howick granted by default of appearance to defend on 16 August 2000, evicting the defendants from the property of the plaintiff. The said property is described as “Gartmore Farm, Sub 9 (a sub of Elderslie) of the farm Welgevonden, number 969, situate in the county of Pietermaritzburg, province of KwaZulu-Natal” (“the farm”).

[2] The plaintiff alleges, in its particulars of claim, that the first defendant’s right of residence arose solely from his contract of employment with the plaintiff and that the second and third defendants’ right of residence arose as a result of their relationship with the first defendant. The plaintiff annexed a document, marked annexure “RA1-5” to its particulars of claim, which document is said to be a contract of employment between the first defendant and the plaintiff. In reality annexure RA1-5 is a “Recognition and Procedural Agreement between Gartmore Farm (Pty) Ltd (‘the Employer’) and National Union of Farmworkers (‘the union’)”. Nowhere in the document is the first defendant’s name mentioned. The document does not refer to any relationship between the plaintiff and the defendant. On

1 Act 62 of 1997, as amended.

the contrary, it deals with such topics as disciplinary procedure, damage to the employer's equipment including tools and vehicles etc. In short, this document does not show that the first defendant was employed by the plaintiff.

[3] The magistrate heard no evidence in the matter. He merely read the "summons and other documents filed of record" and then gave default judgment. The question arises whether it is appropriate for default judgment to be granted in ESTA cases.

[4] In attempting to answer this question one needs to consider the following:

- that the rules of procedure applicable in civil actions and applications in a High Court apply to ESTA proceedings in the magistrates' courts;²
- that, in the High Court, an application for default judgment for a liquidated claim must be submitted to the Registrar in terms of Rule 31(5)(a), and not to the Court in terms of Rule 31(2)(a).³
- that a claim for ejectment has, in the past, been held to be a "liquidated demand";⁴
- that section 26(3) of the Constitution⁵ provides that no one may be evicted from their home...without an order of court made after considering all the relevant circumstances;
- that ESTA has certain peremptory requirements which a court must apply its mind to before granting an eviction;⁶

I propose dealing with each in turn.

High Court Rules apply to ESTA evictions in the magistrates' courts

[5] In terms of section 17(4) of ESTA the rules of procedure applicable in civil actions and applications in a High Court apply to ESTA proceedings in the magistrates' courts until the Rules Board

2 Section 17(4) of ESTA.

3 See for example in *Entabeni Hospital Ltd v Van der Linde* 1994 (2) SA 422 (N).

4 See the discussion at para [7]below.

5 The Constitution of the Republic of South Africa Act 108 of 1996.

6 See for example *Ferguson v Buthelezi* LCC 41R/99, 23 September 1999, [1999] JOL 5408 (LCC) <http://www.law.wits.ac.za/lcc/1999/fergusonsum.html> especially at para [17]-[23].

of the Courts of Law make new rules to govern ESTA proceedings in the magistrates' courts. I note in passing that almost all of the Land Claims Court judgments dealing with section 17(4) and more particularly the difference between the two sets of procedures remain unreported.⁷

Application for default judgment for a liquidated demand must be submitted to the Registrar

[6] Rule 31 of the rules of procedure in the High Court deals with “Judgment on Confession and by Default”.⁸ To determine which sub-rule applies the party applying for default judgment must decide whether his or her claim is “liquidated” or not. If the claim is for a liquidated demand the person applying for default judgment must, not may, submit the application to the Registrar. Use of rule 31(2)(a) when the demand is liquidated will result in the court removing the matter from the roll.⁹ It must, however, be borne in mind that a registrar may require that the matter be set down for hearing in open court.¹⁰ I am of the opinion that, in the magistrate’s court, default judgments in ESTA cases ought to be treated as cases requiring the matter to be set down for hearing in open court.

A claim for ejection is a “liquidated demand”

[7] It has been accepted over the years that a claim for ejection is a “liquidated demand”.¹¹ If that is the case then, in theory, an application for eviction by default in terms of ESTA may be submitted to

7 For example *Uitkyk Farm Estates (Edms) Bpk v Visser and Another*, LCC 60/98, 6 November 1998, internet website <http://www.law.wits.ac.za/lcc/1998/uitkyksum.html>; *Ferguson v Buthlezi* above n 6, compare *Pitout v Mbolane* [2000] 2 All SA 379 (LCC).

8 The relevant sub-rules of Rule 31 provide:
 “(2)(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.
 ...
 5(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.”

9 See *Entabeni Hospital* above n 3.

10 See Rule 31(5)(b)(iv). This rule is discussed in *Standard Bank of SA Ltd v Ngobeni* 1995 (3) SA 235(V)

11 See the cases cited in *Entabeni* above n 3 at 424H.

the Clerk of the Court (if the proceedings have been commenced in the magistrate's court). It seems to me that a distinction needs to be drawn between an order for ejectment by default prior to the coming into operation of the Constitution and ESTA and any such ejectment order applied for thereafter.

Section 26(3) of the Constitution

[8] Section 26(3) of the Constitution provides that:

“(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.”

I am of the opinion that the first sentence means that “order of court” in such cases cannot possibly mean an order granted by default by the registrar in terms of rule 31(5)(a). The legislature could not possibly have intended for a registrar to consider “all the relevant circumstances”. I interpret the first sentence of section 26(3) to mean that there is a duty on the presiding officer to consider all the relevant circumstances before evicting a person from his or her home. This section has been considered but not in relation to the applicability of the rules of procedure. See *Ross v South Peninsula Municipality*¹² and the, as yet unreported, judgment of Flemming DJP in *Betta Eiendomme (Edms) Bpk v Ekple-Epoh*.¹³ Dealing next with the phrase “relevant circumstances”. In my opinion the relevant circumstances which a court ought to consider before granting an eviction in terms of ESTA are contained in ESTA itself. One cannot make a checklist of all the circumstances which will be relevant to an ESTA eviction because some provisions of ESTA may be inapplicable in certain circumstances,¹⁴ however, there are certain provisions which must be considered before a judgment by default may be granted. I will deal with the peremptory requirements of ESTA in the next paragraph.

12 2000 (1) SA 589 (C).

13 Witwatersrand Local Division Case 1736/2000, 28 April 2000.

14 *Ferguson* above n 6 at para [11].

Peremptory requirements contained in ESTA

[9] As is clear from *Ferguson v Buthelezi*¹⁵ even in the case of a settlement agreement, let alone a default judgment, the court still has certain duties to perform before granting an eviction order. For example the court must, in applicable circumstances, call for a section 9(3) report.¹⁶ That certain duties rest upon a court before granting an eviction satisfies me that an application for default judgment ought to go before the magistrate rather than the clerk of the court.

Applying for default judgment in ESTA cases

[10] Having taken all of the above into account I come to the conclusion that an application for an ejection order by default of appearance to defend must, immediately it is received by the clerk of the court, be set down for hearing in open court as provided by rule 31(5)(b)(vi). It is unclear whether that means that rule 31(2)(a) then comes into operation, requiring the plaintiff to give notice of the set down and requiring the court to hear evidence. The plaintiff ought to err on the side of caution and serve the notice of set down on the occupier and the court ought to call for evidence on any issues requiring clarity.

Defects in the plaintiff's papers

[11] There are numerous aspects of the plaintiff's papers that are defective. In an application for default judgment the magistrate ought not to grant an eviction if the plaintiff's papers are defective.

[12] In terms of rule 19 of the High Court rules the defendant ought to have been given 10 days within which to enter an appearance to defend. In this case rule 5(1) of the magistrate's court rules was followed and only 5 days were given within which to enter an appearance to defend.

15 See above n 6.

16 I will discuss this report in more detail in paragraph [15].

[13] While there are returns of service of the notice of intention to apply for an eviction order¹⁷ with respect to first, second and third defendants, there are no copies of these documents in the file. Given that a copy of the notice in terms of section 9(2)(d)(ii) and (iii)¹⁸ is in the file, it is more than surprising that there is no copy of the 9(2)(d)(i) notice.

[14] There are three copies of notices in terms of section 9(2)(d)(ii) and (iii) (one in respect of each defendant). Each copy is addressed to both the municipality and provincial office of the Department of Land Affairs. The notices with respect to first and second defendants bear a signature of the recipient of the notices. The signature of the recipient looks like “Hereen Ryle” and the designation is given as “Executive Secretary”, I assume that Ryle is an employee of the Department of Land Affairs, Pietermaritzburg as the first page contains a stamp from the Regional Office of the Department of Land Affairs. I cannot understand why Ryle did not put the stamp with the signature on the next page. It appears that a certain Mxolisi, acting for the Ndlovu Regional Council and Ryle received the section 9(2)(d)(ii) and (iii) notice relating to the third defendant. As the signature of Mxolisi appears only on one of the three section 9(2)(d)(ii) and (iii) notices the magistrate ought to have established the facts in relation to the alleged service of the notices.

[15] The particulars of claim give no indication of when the defendants became occupiers on the plaintiff’s farm. Consequently, the magistrate was unable to determine whether section 10 or section 11 applies. In other words the magistrate did not comply with section 9(2)(c).¹⁹

[16] It is extremely important to establish which of the two sections apply. Without this information a magistrate cannot know whether he should request a section 9(3)²⁰ report or not. For example,

17 Notices in terms of section 9(2)(d)(i) of the Act.

18 Notices of intention to apply for an eviction order served on the municipality and the provincial office of the Department of Land Affairs.

19 The relevant portion of section 9(2) reads:

“(2) A court may make an order for the eviction of an occupier if-

.....

(c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with;”

20 Section 9(3) provides as follows:

ESTA requires a magistrate to request a section 9(3) report in respect of persons who became occupiers after 4 February 1997. ESTA does not, however, require a section 9(3) report in respect of persons who became occupiers on or before 4 February 1997 and whose evictions occur in accordance with section 10(1).²¹

[17] It is unclear whether section 13 applies. Due to this uncertainty the magistrate ought to have made an inquiry into the issues contained in that section ²² before granting default judgment.

[18] I am satisfied that the magistrate ought not to have granted the eviction order in this case, consequently I make the following order:

The order made by the Magistrate, Howick on 16 August 2000 in case number 1135/2000, evicting the defendants and granting other relief, is set aside in whole.

ACTING JUDGE MOLOTO

For the plaintiff:

Austen Smith Attorneys, Pietermaritzburg.

For the respondent:

No appearance.

“(3) 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 a 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.”

21 *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another* LCC 44R/00, 7 July 2000, internet web site <http://www.law.wits.ac.za/lcc/2000/44r00.sum.html> at para [19].

22 On this aspect see *Ferguson* above n 6 at para [22].

