

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **MOLOTO AJ**

CASE NUMBER: LCC 89R/00

MAGISTRATE'S COURT CASE NUMBER: 2591/00

Decided on: 13 December 2000

In the review proceedings in the case between:

VAN NIEKERK NO

Applicant

and

MOLOI, S

1st Respondent

MPHUTHI, T

2nd Respondent

NGWENYA, S

3rd Respondent

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, Standerton granted by default of appearance to defend on 19 October 2000, evicting the respondents from various portions of Vlakfontein, Mpumalanga. I will refer to these various portions collectively as “the farm”.

Facts

[2] The applicant is the executor of the deceased estate of Ernest Gerald Cuyler (the “deceased”). The deceased sold the farm to Willows Trust on condition that the trust received vacant possession.²

1 Act 62 of 1997, as amended.

2 Section 24 of ESTA provides for consent to be binding on a successor in title.

The trust has taken occupation of the farm and has demanded that the various occupiers be removed. The deceased died on 16 November 1998.

[3] The respondents were all employed by the deceased. Even although the deceased had long since ceased farming operations the respondents were allowed to continue residing on the farm. On 23 June 1999 the respondents were all given written notice to vacate the farm by 30 August 1999. The respondents have refused to vacate the farm.

The requirements for an eviction order in terms of ESTA

[4] In order to evict an occupier from a farm, the owner or person in charge must comply with the various requirements of section 9 of ESTA. Section 9 read as follows:

“9 **Limitation on eviction**

- (1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.
- (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 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 a court has, after the termination of the right of 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.

I am satisfied that all but section 9(2)(c) have been complied with. I will discuss the failure to comply with section 9(2)(c) under the heading non-compliance with section 10.

Non-compliance with section 9(3)

[5] Section 9(3) provides:

“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.”

The magistrate failed to request a report in terms of section 9(3). The eviction order cannot be confirmed until the magistrate has requested a section 9(3) report which must be supplied within a reasonable time. As I have said in another judgment handed down on 12 December 2000³ I am of the opinion that *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another*⁴ ought not to be used as a precedent to justify not calling for a section 9(3) report. I am of the opinion that a report must be requested in all circumstances. It will then be up to the presiding officer to decide what weight to put on the availability or otherwise of alternative accommodation when the loss of occupation rights is due to the fault of the occupier.

3 *Valley Packers Co-operative Limited v Dietloff and another* LCC 84R/00, as yet unreported.

4 [2000] 3 All SA 279 (LCC).

Non-compliance with section 10

[6] Although the applicant alleges that it seeks an eviction order based on section 10(1)(d)⁵ I am not satisfied that an employee whose employment ceases because his employer has died can be said to have resigned voluntarily. There are allegations in the applicant's papers that the respondents are abusing the water facility on the premises and that the water account is presently being paid for by the trust. There are various other allegations. All the allegations that the applicant is seeking to rely upon to show compliance with section 10(1)(a), (b) or (c) are hearsay. In the event of the applicant re-applying for an eviction order he would be advised to properly support the allegations. I also note in passing that once an occupier's right of residence has been lawfully terminated it is not always the case that he is entitled to reside on the property on the same conditions as previously.⁶

Non-compliance with section 12

[7] According to section 12(1) a court which orders the eviction of an occupier must:

- “(a) determine a just and equitable date on which the occupier shall vacate the land; and
- (b) determine the date on which an eviction order may be carried out if the occupier has not vacated the land on the date contemplated in paragraph (a).”

5 Section 10(1)(d) provides that an order for the eviction of a person who was an occupier on 4 February 1997 may be granted if 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.”

6 Section 8(7) provides:

“ If an occupier's right to residence has been terminated in terms of this section . . . -

- (a) the occupier and the owner or person in charge may agree that the terms and conditions under which the occupier resided on the land prior to such termination shall apply to any period between the date of termination and the date for the eviction of the occupier; or
- (b) the owner or person in charge may institute proceedings in a court for a determination of reasonable terms and conditions of further residence, having regard to the income of all the occupiers in the household.”

Clearly two separate dates are envisaged, a date to vacate and a date on which the respondents will be evicted if they fail to move of their own accord.⁷ Whilst it might be technically correct for the vacation date to be a date 21 days after review I am of the opinion that the magistrate should specify calendar dates. This will allow for greater certainty. It is advisable for the applicant to suggest a vacation date that allows for the review to take place, although no eviction order may be executed until this Court has reviewed the proceedings and confirmed the order.⁸

Non- Compliance with section 13

[8] Section 13 provides, amongst other things, that a court must order the owner to pay the occupier compensation for structures erected or improvements made when granting an eviction order.⁹ The

7 See *Roux v Lekekiso*, LCC 13R/98, 16 November 1998, [1998] JOL 4157 (LCC), internet web site <http://www.law.wits.ac.za/lcc/lccalph.html> at para [10]. See also *Vooraus Beleggings (Edms) (Bpk) v Molefe and Another*, LCC 9R/00, 7 March 2000, internet web site <http://www.law.wits.ac.za/lcc/2000/9r00sum.html> at para [7].

8 Section 19(5). This section provides that
 “any order for eviction contemplated in section 19(3) shall be suspended pending the review thereof by the Land Claims Court.”
 Section 19(5) was introduced 24 March 2000 by the Land Affairs General Amendment Act, 11 of 2000.

9 Section 13(1) provides:
 “ If a court makes an order for eviction in terms of this Act-

- (a) the court shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors, including whether-
 - (i) the improvements were made or the crops planted with the consent of the owner or person in charge;
 - (ii) the improvements were necessary or useful to the occupier; and
 - (iii) a written agreement between the occupier and the owner or person in charge, entered into prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement;
- (b) the court shall order the owner or person in charge to pay any outstanding wages and related amounts that are due in terms of the Basic Conditions of Employment Act, 1983 (Act 3 of 1983) the Labour Relations Act or a determination made in terms of the Wage Act, 1957 (Act 5 of 1957); and
- (c) the court may order the owner or person in charge to grant the occupier a fair opportunity to-
 - (i) demolish any structures and improvements erected or made by the occupier and his or her predecessors, and to remove materials so salvaged; and
 - (ii) tend standing crops to which he or she is entitled until they are ready for harvesting, and then to harvest and remove them. ”

magistrate ought to have conducted an enquiry in terms of section 13 to determine whether or not the respondents were entitled to compensation or whether the respondents ought to have been given an opportunity to demolish the structures and to remove any salvaged materials.

Costs

[9] The magistrate granted the order prayed and I accept for the purposes of this judgment that no costs were awarded as the matter was undefended. This is in keeping with the approach of this Court that unless there are special circumstances which justify a costs order no costs order is granted.¹⁰

ORDER

[10] I make the following order:

- (a) the order for the eviction of the respondents granted by default by the Magistrate, Standerton on 19 October 2000 in case 2591/00 is set aside in its entirety;
- (b) the applicant is given leave to approach the court for an eviction order on the same papers suitably amended and amplified;
- (c) the magistrate is directed to request a report in terms of section 9(3);
- (d) when setting the matter down for re-hearing the applicant must give the municipality and the head of the regional office of the Department of Land Affairs at least 10 court days notice of the re-hearing.

ACTING JUDGE MOLOTO

¹⁰ See for example *Ngwenya and Others v Grannersberger* 1999 (4) SA 62 (LCC) at para [16]; *Serole and Another v Pienaar* [1999] 1 All SA 562 (LCC); 2000 (1) SA 328 (LCC) at para [19].

For the applicant:

Van Heerden, Schoeman Incorporated, Standerton.

For the respondents:

No appearance.