

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

**RANDBURG**

**CASE NUMBER: LCC 99R/00**

In chambers: **MOLOTO AJ**

**MAGISTRATE'S COURT CASE NUMBER: 2218/00**

Decided on 20 February 2001

In the review proceedings in the case between:

**MARTIN J KIFT**

Applicant

and

**PAULUS WINDVOGEL**

1<sup>st</sup> Respondent

**ANN WINDVOGEL**

2<sup>nd</sup> Respondent

**KLAAS GROOTBOOM**

3<sup>rd</sup> Respondent

**KATY GROOTBOOM**

4<sup>th</sup> Respondent

**IRENE GROOTBOOM**

5<sup>th</sup> Respondent

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## JUDGMENT

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**MOLOTO AJ:**

[1] This is an automatic review in terms of section 19(3) of the Extension of Security of Tenure Act<sup>1</sup> ("ESTA") of an order of the Magistrate, Humansdorp granted on 11 October 2000, evicting the respondents from portion 3 (a portion of Palmiet Vlei Oost) of the farm Zalverige Valley, Humansdorp, Eastern Cape. The property is also known as Schoonfontein, I will refer to the property as "the farm".

### Facts

[2] The applicant is the lessee of the farm. The first respondent was employed as a farm worker and his right of residence arose solely from his employment. The second respondent is the wife of the first

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1 Act 62 of 1997, as amended.

respondent. The third and fourth respondents are the parents of the second respondent. The fifth respondent is the sister of the second respondent. The second, third, fourth and fifth respondents' right of residence is dependent on the right of residence of the first respondent. The applicant alleges that the first respondent resigned voluntarily on or about 19 April 2000. The applicant gave the first respondent two months within which to vacate the farm. This he has refused to do.

The requirements for an eviction order in terms of ESTA

[3] 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 will deal with each sub-section in turn.

### Compliance with section 9(2)(a)

[4] In order to comply with section 9(2)(a) on the applicant's version that the first respondent resigned, section 8(2) and possibly 8(3) are relevant to the termination of the first respondent's right of residence. Section 8(2) provides that:

“The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.”

Section 8(3) provides that:

“Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act”.

This Court has accepted that if the respondent has failed to act timeously in terms of his rights to dispute the fairness of a dismissal, the labour matter may be held to have been determined.<sup>2</sup> I am satisfied that if I accept the applicant's version that the first respondent resigned voluntarily then the applicant has shown compliance with section 8(2). The onus is on the respondents to show that there is a labour dispute pending, which they have failed to do. This is, however, not the end of the matter as will become clear when I discuss compliance with section 9(2)(c).

### Compliance with section 9(2)(b)

[5] The respondents failed to vacate the farm within the time given. Obviously if the grounds for giving the notice are invalid then there is no duty on the respondents to vacate. Once again the focus is on whether or not the first respondent resigned voluntarily. I turn now to consider whether the applicant has complied with section 9(2)(c).

### Non-compliance with section 9(2)(c)

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2 *Holdengarde v Zondi and Another* [2000] 4 All SA 319 (LCC); 2000 (4) SA 910 (LCC).

[6] In order to comply with section 9(2)(c) the applicant must comply with either section 10 or section 11 of ESTA. The deciding factor is whether the occupier resided on the land on 4 February 1997 or at some time thereafter. If the occupier resided on the land on 4 February 1997 then section 10 applies. In this case the first respondent resided on the land on 4 February 1997. In order to comply with section 9(2)(c) the applicant must show that the first respondent (an employee whose right of residence arose solely from his employment) resigned voluntarily in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act. On this crucial aspect of the application there appears to be a dispute of fact as the first respondent denies that he resigned voluntarily. In this case the respondent was not legally represented and he did not comply with the rules which required him to submit his opposing papers within a given time limit. However there is sufficient information in the file which indicates that the first respondent's version was that he had not resigned voluntarily. For example there is a letter from the Department of Land Affairs dated 22 September 2000 and stamped by the Clerk of the Court on 28 September 2000. The letter from the Department of Land Affairs also contains an annexure, a statement under oath by the first respondent setting out his version of the events. The letter was also sent to the attorneys representing the applicant. The letter concluded with a request for the court to allow the respondents time to obtain legal aid. There is an almost illegible note on the last page of the letter, presumably by the magistrate, relating to legal aid.

[7] When the court is faced with a dispute of fact the general approach has been set out as follows:

' . . . where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of the fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averments, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which it seeks. . . .'<sup>3</sup>

Despite all of the above the matter was not postponed on 11 October 2000 for legal representation or to hear evidence on the dispute of fact. It seems to me that the applicant was of the opinion that the

dispute over the resignation ought to be decided through the Labour Relations Act<sup>4</sup> procedures. He argued, through his legal representative, that the magistrate was entitled to accept the applicant's version that the first respondent resigned voluntarily. The magistrate did not provide reasons for granting the eviction order so I assume that the magistrate accepted this argument because he granted the eviction order despite the letter from the Department of Land Affairs and despite the indication therein that the first respondent was denying he had resigned voluntarily. The issue here is whether or not the magistrate had the power to investigate the truth behind the resignation/dismissal and if not what steps ought he to have taken when presented with a glaring dispute of fact. It was a miscarriage of justice for the magistrate to decide the matter in the circumstances notwithstanding the first respondent's representations for a postponement in order to get legal aid.

[8] ESTA expressly states that a dispute over the termination of the employment relationship must be dealt with in accordance with the Labour Relations Act. It seems then that even if the application is one in terms of section 10(1)(d) of ESTA any suggestion that the resignation was not voluntary must be dealt with through the proper channels. The magistrate does not have the jurisdiction to decide whether the dismissal was voluntary or not. The magistrate may not, in my opinion, ignore the fact that there is some doubt that the employment relationship has indeed terminated. He must determine whether the termination of the employment relationship was in accordance with section 8(2) and (3). It would be a travesty of justice if an applicant could obtain an eviction order in the face of clearly conflicting facts without at the very least postponing the matter until the first respondent has been given a proper opportunity to adduce evidence that there is a labour dispute pending. That does not mean that in every section 10(1)(d) case an occupier is entitled to stall an eviction. Great caution must be exercised in such matters because of the heavy burden placed on an owner<sup>5</sup> to provide a place of residence pending the resolution of the labour dispute.<sup>6</sup> I propose referring the matter back to the magistrate to determine whether sub-sections 8(2) and (3) has been complied with in order to determine the validity of the notice terminating the right of residence.

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4 Act 66 of 1995.

5 For the purposes of this judgment any general reference to an owner also means a person in charge.

6 See *Karabo v Kok and Others* 1998 (4) SA 1014 (LCC); [1998] 3 All SA 625 (LCC).

Compliance with section 9(2)(d)

[9] Section 9(2)(d)(i) notices were served on the respondents on 27 July 2000 in English and Afrikaans. Notices in terms of section 9(2)(d)(ii) and (iii) were served by registered post on the “Westelike Distriksraad” and the Port Elizabeth office of the Department of Land Affairs on 20 July 2000, by hand delivery to the Humansdorp municipality on 21 July 2000, and by registered post on the Kareedouw municipality on 24 July 2000. It appears that the farm is not within a municipal area and the land owner was merely being cautious in ensuring service on all the possible local government departments in the area. No doubt it is better to be overly cautious. I am satisfied that section 9(2)(d) has been complied with.

Non-compliance with section 9(3)

[10] 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.”

As I have said in another judgment handed down on 12 December 2000<sup>7</sup> I am of the opinion that a report must be requested in all circumstances. Should the report be forthcoming in a reasonable time it will then be up to the presiding officer to decide what weight must be given to the availability or otherwise of alternative accommodation when the loss of occupation rights is due to the fault of the

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<sup>7</sup> *Valley Packers Co-operative Limited v Dietloff and another* LCC 84R/00, <http://www.law.wits.ac.za/lcc/2000/84r00sum.html>

occupier. In this case the magistrate did not request a report in terms of section 9(3). Assuming that the applicant intends proceeding with this matter the magistrate must request a report in terms of section 9(3).<sup>8</sup>

### Non-compliance with section 12

[11] 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).”

Clearly two separate dates are envisaged, a date to vacate and a date on which the respondents will be evicted if they have failed to vacate of their own accord.<sup>9</sup> Whilst it might be technically correct for the vacation date to be 7 days after the review by the Land Claims Court, I am of the opinion that the magistrate ought to specify calendar dates. This will allow for greater certainty both for the land owner and the occupier. The vacation date must allow for the review to take place, and one must also bear in mind that in any event an eviction order may not be executed until this Court has reviewed the proceedings and confirmed the order.<sup>10</sup>

### Non- Compliance with section 13

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8 The Minister of Agriculture and Land Affairs determined that the Director of the Provincial Office of the Department of Land Affairs is an officer of the department for the purposes of section 9(3). See General Notice 4673 published in Government Gazette 21907 on 22 December 2000.

9 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]; *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].

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

[12] Section 13 provides, amongst other things, that a court must order the owner to pay the occupier compensation for any structures erected or improvements made when granting an eviction order.<sup>11</sup> The 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

[13] The costs order granted by the Magistrate is to the effect that the costs will only be awarded if the matter is undefended. The magistrate ought to have stated either that the costs were awarded against the respondents or that no costs were awarded. The approach of this Court is not to award costs unless there are special circumstances which justify such an order against one of the parties.<sup>12</sup>

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11 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. ”

12 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].

**Order**

[14] I make the following order:

- (a) the order for the eviction of the respondents granted by the Magistrate, Humansdorp on 11 October 2000 in case 2218/00 is set aside in its entirety;
- (b) the first respondent must be afforded an opportunity to obtain legal aid and to the extent that the Magistrate is the local legal aid officer, he must assist the first respondent in obtaining such legal aid;
- (c) the Magistrate must determine whether section 8(2) and (3) has been complied with;
- (d) the Magistrate is directed to request a report in terms of section 9(3) of the Extension of Security of Tenure Act 62 of 1997;
- (e) this matter may be set down for re-hearing not less than 10 court days after service of this judgment on the respondents;
- (f) if an eviction order is granted, the Magistrate must comply with sections 12(1), 13 and 19(5) of the Extension of Security of Tenure Act 62 of 1997.
- (g) service of this judgment must be effected by the Sheriff, Humansdorp.

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**ACTING JUDGE J MOLOTO**

For the applicant:

*Nel Mentz Incorporated, Humansdorp.*

For the respondents:

*In person.*