

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **Moloto AJ**

CASE NUMBER: LCC 55R/2001

MAGISTRATE'S COURT CASE NUMBER: 90/2001

Decided on: 30 May 2001

In the review proceedings in the case between:

HOWARTH, M

Applicant

and

SCHOEMAN, S
NTENGU, E

First Respondent
Second Respondent

JUDGMENT

MOLOTO AJ:

[1] This is an automatic review in terms of section 19(3) of the Extension of Security of Tenure Act¹ ("the Act") of an order of the Magistrate, Alexandria granted by default of appearance to defend on 3 May 2001, evicting the respondents from the farm High Fields No 362, Alexandria, Eastern Cape Province ("the farm").

Facts

[2] The applicant is the person in charge of the farming operation on the farm. The farm is owned by the applicant's father. The first respondent is an erstwhile employee of the applicant and the second respondent is living with the first respondent as his wife.

1 Act 62 of 1997, as amended.

[3] The first respondent's right of residence arises solely from his employment with the applicant. He was dismissed from his employment in November 1999. Since that time the applicant has been attempting to persuade the first respondent to vacate the farm, but to no avail.

The requirements for an eviction order

[4] In order to evict an occupier from land, the owner or person in charge must comply with the various requirements of section 9. Section 9 reads 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.

(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.”²

Non-compliance with section 9(2)(a)

[5] In order to comply with section 9(2)(a) an owner or person in charge must terminate the occupier’s right of residence in accordance with section 8. The portions of section 8 which are relevant for this review provide:

“(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-

- (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
- (b) the conduct of the parties giving rise to the termination;
- (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
- (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
- (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

(2) 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.

(3) 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.

(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-

- (a) has reached the age of 60 years; or
- (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,

2 Section 9(3) was introduced into the Act on 24 March 2000 by the Land Affairs General Amendment Act, Act 11 of 2000.

may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.”

It is very clear from the quoted portions of this section that there are different categories of occupier. It depends entirely on the category of occupier and the surrounding circumstances as to how a land owner or person in charge would go about terminating the right of residence of that occupier. In this case the husband has lost his employment, therefore the applicant may follow either section 8(1), section 8(2) read with section 8(3) or section 8(4)³ to start eviction proceedings. The facts will determine which subsection ought to be applied. In this case there is some uncertainty about the age of the first respondent therefore I am unable to determine which sub-section of section 8 is applicable. Turning then to the facts surrounding the second respondent she must be treated in accordance with section 8(1) even although her right of residence clearly emanates from her relationship with the first respondent. It is not automatic that she will lose her right to reside on the farm simply because her husband has lost his employment.⁴ It is likely that a person who derives the right to stay on a farm solely through a relationship with a spouse whose right of residence has been terminated will consequently lose the right to stay on the farm but each case must be looked at on its own merits. Without going into a detailed analysis of section 8(1) I find that to ensure fairness the second respondent ought to have been informed that her right of residence had terminated. Section 9(2)(a) has not been complied with in respect of either of the respondents.

Non-compliance with section 9(2)(b)

[6] The applicant cannot show compliance with section 9(2)(b) until there has been compliance with section 9(2)(a).

3 This section would apply if the first respondent has resided on the farm for more than 10 years and he is over 60 years or is an employee or former employee who, as a result of ill health, injury or disability is unable to supply labour to the applicant.

4 See *Conradie v Hanekom and Another* [1999] 2 All SA 525 (LCC); 1999 (4) SA 491 (LCC).

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

[7] In order to comply with section 9(2)(c) the applicant must comply with either section 10 or section 11. As the respondents were in occupation on 4 February 1997, the applicant must comply with section 10. This section provides as follows:

“(1)An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-

- (a) the occupier has breached section 6 (3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
- (b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice in writing to do so;
- (c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or
- (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.

(2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.

(3) If-

- (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
- (b) the owner or person in charge provided the dwelling occupied by the occupier; and
- (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to-

- (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and
- (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.”

The applicant relies on various sub-sections of section 10 in the alternative. I am not altogether convinced that the reprehensible behaviour of the respondents committed after the right of residence was terminated may be used to prove compliance with section 10(1). As I have other problems with the papers I do not intend to decide the issue. What I have said must not be construed as condonation of the reprehensible behaviour. Such behaviour will at the very least give an owner or person in charge yet another ground for seeking an eviction order. The applicant makes no mention of section 10(2) which makes me wonder if the availability of suitable alternative accommodation is problematic. I have not had the benefit of a section 9(3) report⁵ which may have shed some light on the availability of suitable alternative accommodation. In order to comply with section 10(3) certain circumstances must prevail. It is not settled law whether an owner (or person in charge) has to prove all the requirements of section 10(3), or whether one or some of the requirements will suffice.⁶ It is not necessary for me to decide this issue because of all the other defects with the papers. Section 9(2)(c) has not been complied with.

Non-compliance with section 9(2)(d)(i)

[8] There is no notice in terms of subsection 9(2)(d)(i) but the proviso to section 9(2)(d) clearly envisages bypassing this stage as long as the notice of application to the court has 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

5 I will discuss this in more detail below.

6 In other words must the “and” between (a), (b) and (c) be interpreted cumulatively or disjunctively? See the unreported judgment of Meer J in *Rix v Arnolds and others* LCC 59R/99, 16 November 1999, internet web site <http://www.law.wits.ac.za/lcc/1999/rixsum.html> where she held that section 10(3) had been complied with even although it was clear that the owner did not need the dwellings for persons employed or to be employed by the owner.

application.⁷ A notice of motion was served on the respondents on 23 February 2001 indicating that the applicant would be applying for an order in court on 2 May 2001. There is no indication whatsoever in the notice of motion that the respondents are required to do anything.⁸ High Court rule 6(5) provides that the notice of motion of all applications other than those brought *ex parte* must be in accordance with Form 2(a).⁹ As I have said previously:

“It is important that people who are notified of cases against them be notified in such a way that they are left in no doubt as to their rights and duties, and the consequences of failure to protect such rights or perform such duties. It is therefore, important that litigants adhere to the prescribed forms and procedures, not just for formality’s sake, but more importantly so that justice does not miscarry. It is true that the Court has a discretion to condone failure to comply with rules, where no prejudice is likely to be suffered by the opposite side. However, where there are possibilities of grave prejudice being suffered, as in the present case, it is the court’s duty to intervene.”¹⁰

In the present case I am not prepared to condone the non-compliance with the rules because I do not know if the respondents failed to defend the application for their eviction out of ignorance of their rights or for some other reason unknown to me. Failure to comply with the rules is therefore fatal to these proceedings.

Non-compliance with section 9(2)(d)(ii) and (iii)

[9] The notice of motion was served by the sheriff, Alexandria on the Acting Town Clerk on 23 February 2001. The deputy sheriff, Port Elizabeth served the notice of motion on an employee of the Department of Land Affairs on 28 February 2001. The deputy sheriff has indicated that he served the notice in accordance with rule 9(3)(e) of the Magistrates’ Courts rules. The question which arises is

7 Note that the calculation of the two month period commences after the termination of the right of residence.

8 Section 17(4) provides that the rules of procedure applicable in civil applications in a High Court apply in respect of any proceedings in a magistrate’s court in terms of the Act, that is at least until special rules are made in terms of section 17(3). Such rules have not as yet been made, therefore the High Court rules apply to these proceedings.

9 Form 2(a) is to be found in the First Schedule to the High Court rules. For further discussion on form 2 and form 2(a) see *Van der Merwe v Maduna and Others*, LCC 67R/99, 11 November 1999, internet web site <http://www.law.wits.ac.za/lcc/1999/vdmerwessum.html> at paras [2]-[4].

10 *African Charcoal (Pty) Ltd v Ndlovu* [2000] 2 All SA 19 (LCC) at para [8].

whether the notice of motion ought to have been served in accordance with regulation 9(6)(b) of the prescribed regulations.¹¹ I am of the view that when the notice of motion takes the place of Form F then service ought to be effected:

“by handing a copy of the notice to the director of the provincial office concerned or any person apparently authorised to act on his or her behalf, in the case of a provincial office of the Department of Land Affairs;”¹²

I am fortified in my view by the importance of the role of the Department of Land Affairs¹³ in eviction proceedings in terms of the Act. I am unable to determine whether Mrs de Mingo is the director of the provincial office or a person apparently authorised to act on the director’s behalf as the capacity of the employee has not been indicated on the return. Furthermore even if the various notices had been properly served there would still not be compliance with section 9(2)(d) as section 9(2)(a) must be complied with before an owner is entitled to take steps in terms of section 9(2)(d).

Non-compliance with section 9(3)

[10] The magistrate’s attention is drawn to the provisions of section 9(3) which was introduced on 24 March 2000.¹⁴ As Meer AJ and I have said previously, a section 9(3) report must be requested.¹⁵ There is no indication on the papers before me that this was done.

Non-compliance with section 13

11 The regulations are published in R1632 Government Gazette 19587, 18 December 1998.

12 Regulation 9(6)(b) of the Regulations referred to above n10.

13 *Lategan v Koopman and others* 1998 (3) 457 (LCC), [1998] 3 All SA 603 (LCC) at para [13]; *De Kock v Juggels and Another* 1999 (4) SA 43 (LCC) at para [25] (dealing with the law as it was before section 9(3) was introduced).

14 See above n 2.

15 See *Valley Packers Co-Operative Limited v Dietloff and Another* [2001] 2 All SA 30 (LCC) and *Glen Elgin Trust v Titus and Another* [2000] 2 All SA 30 (LCC). Compare *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another* 2001 (1) SA 1017 (LCC); [2000] 3 All SA 279 (LCC).

[11] This court has indicated on previous occasions that section 13 is peremptory.¹⁶ The court must apply its mind to all the provisions within the section, not just money due to the first respondent arising from his employment. The magistrate erred in making an order that the applicant “not be ordered to pay compensation to the Respondents in respect of this action (*sic*)” without at least conducting an inquiry in terms of section 13.

Non-compliance with section 19(5)

[12] Section 19(5) was introduced on 24 March 2000. It reads:

“Any order for eviction contemplated in subsection (3) shall be suspended pending the review thereof by the Land Claims Court.”

There is no indication that this section was considered by the magistrate. It would be a sound practice for magistrates to expressly indicate on the order that an eviction is suspended pending review.

Costs

[13] The magistrate ordered the respondents to pay the costs of the application. This is not in keeping with the approach of this Court. This Court has made it clear that unless there are special circumstances which justify a costs order no costs order is made.¹⁷ This is not to say that special circumstances do not apply in this case to justify an adverse costs order, what I am saying is that I would have expected the magistrate to have given reasons for awarding costs against the respondents in their absence if he believed such an order was justified.

Order

[14] I make the following order:

16 See for example *Pitout v Mbolane* [2000] 2 All SA 379 (LCC) at para [15].

17 See, for example, *Serole and Another v Pienaar* [1999] 1 All SA 562 (LCC) at para [19]; *Skhosana and Others v Roos T/A Roos se Oord* [1999] 2 All SA 652 (LCC) at para [30].

The order for eviction given by default by the Magistrate, Alexandria on 3 May 2001 in case 90/2001 is hereby set aside in whole in terms of section 19(3)(b) of the Extension of Security of Tenure Act 62 of 1997.

ACTING JUDGE J MOLOTO

For the applicant:

De Jager and Lordan Attorneys, Alexandria

For the respondents:

No appearance.