

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **Meer AJ**

CASE NUMBER: LCC 69R/01

MAGISTRATE'S COURT CASE NUMBER: AA1b/2001

Decided on: 27 July 2001

In the review proceedings in the case between:

LABUSCHAGNE, G C P

Applicant

and

SAMSON, B

First Respondent

SAMSON, M

Second Respondent

JUDGMENT

MEER AJ:

[1] This judgment concerns a review in terms of section 19(3) of the Extension of Security of Tenure Act¹ ("the Act") of an order by the magistrate, Welkom, evicting the respondents from the farm Wolwepan, ("the farm") owned by the applicant, in the district of Welkom, Free State. The order was granted on 26 June 2001 in the absence of the respondents. On 24 July 2001 I set aside the eviction order in its entirety. I indicated my reasons would follow. My reasons are as follows:

[2] In contravention of High Court rule 6(5) the magistrate erred in granting an eviction application brought on notice of motion which was not in accordance with Form 2(a),² the respondents were consequently not informed of their procedural rights and were prejudiced.

1 Act 62 of 1997, as amended.

2 Contained in the first schedule to the High Court rules.

[3] Section 17(4) of the Act provides that the rules of procedure applicable in civil actions and applications in a High Court shall apply in proceedings in a magistrate's court in terms of the Act, until rules of court for the magistrate's courts are made in terms of section 17(3). Such rules have to date not yet been made. 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).³ This form, in addition to setting out the relief sought, importantly informs the respondent of his/her procedural rights and explains time frames for further pleadings. This information becomes particularly important where there are unsophisticated respondents in a case such as this. In contravention of High Court rule 6(5)(a) the application for the eviction of the respondents was modelled on the incorrect Form 2 used in *ex parte* applications, (which the present case clearly is not). It also sought and obtained a temporary order that the respondents vacate the farm on 24 July 2001, failing which they be evicted on 31 July 2001, precisely the same date for which the return date (upon which the respondents were to show cause why the order should not be made final), was set. There is moreover no indication that the notice of motion was served on the respondents. It is the practice in an urgent application for a temporary order to be granted and a return day to be set.⁴ This is because very little or possibly no notice of an application can be given because of the urgency and the court is asked to condone non-compliance with the rules for service. No case for urgency was made out in this matter nor was leave sought for dispensing with the procedural requirements for notice and service. This matter not being in the nature of an urgent application, it is incomprehensible why a temporary order was sought or granted. It is also incomprehensible why the

3 For a full discussion on Form 2 and Form 2(a) see *Van der Merwe and Maduna*, LCC 67R/99, 11 November 1999, internet web site <http://www.law.wits.ac.za/lcc/1999/vdmerwessum.html> at paras [2]-[4]; *Conradie v Geduld and Another*, LCC 60R/01, 15 June 2001 internet web site <http://www.law.wits.ac.za/lcc/2001/60r01sum.html> at paras [2]-[4].

4 *Conradie* above n 3 at para [4] reads:
“I note also that the practice in urgent applications which are not brought *ex parte* is to give a respondent very little and indeed (if the circumstances warrant it), no notice. When this happens form 2(a) must nonetheless be used, but with such adaptations as to notice and service as is warranted by the circumstances of the case. The leave of the court must also be sought to dispense with the procedural requirements relating to notice and service, usually by asking the court to condone the non-compliance with the rules. This was not done in the present case. What also occurs in urgent applications when very little notice, or more especially no notice, is given, is that a temporary order is often granted and a return day is set. The respondent is called upon to show cause on the return day why the order should not be made final. This gives a respondent the time and opportunity to prepare an opposition to the application, and be heard on the return day.”

requirement for service was waived by the Court. The magistrate accordingly erred in granting the order, given these procedural irregularities.

[4] I note in passing that even had service occurred, the lack in foresight of setting both the return date and the eviction date for 31 July 2001, would have meant that little purpose would be served by the respondents being given the opportunity to show cause thereon.

Compliance with section 9(2) of the Act

[5] Of the mandatory requirements specified at section 9(2) of the Act for the granting of an eviction order, I am only able to find compliance with sections 9(2)(a) and (b). In accordance with section 9(2)(a) the first respondent's right of residence, which stemmed from his employment on the farm, was terminated in accordance with section 8(2) of the Act. He was dismissed on 19 February 2001 after a final warning, for damaging property on the farm and absenteeism. The second respondent's right of residence stemmed from her relationship with the first respondent as his wife. The respondents failed to vacate the farm within the period of notice given.

[6] I am unable to find compliance with section 9(2)(c) of the Act, which requires that the conditions for an order for eviction in terms of section 10 or 11 be complied with. Whilst the eviction order was sought and granted in terms of section 10(1) of the Act, there is no indication in the founding affidavit that the respondents were occupiers on 4 February 1997, the date to which section 10(1) applies. There are also insufficient allegations to justify the granting of an eviction order in terms of any of the subsections of sections 10(1).⁵

5 Section 10(1) reads:

“(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,

[7] I am able to find only partial compliance with section 9(2)(d) for the following reasons. Firstly, the notice in terms of section 9(2)(d)(iii) was served on the Department of Land Affairs in Welkom instead of on the head of the Department's provincial office in Bloemfontein as is required by the section. Secondly, regulation 9(2)(a)⁶ of the Regulations in terms of the Act was not complied with, in that a copy of the notice to the occupiers⁷ was served only in English. The regulation requires that the notice be served in the language best understood by an occupier and in another official language.

Non-compliance with section 9(3)

[8] The magistrate failed to request a report in terms of section 9(3) of the Act. This is another mandatory requirement and it is of concern that an eviction order was granted in the absence hereof.⁸

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- (d) either at all or in a manner which could reasonably restore the relationship; or 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 Regulation 9(2)(a) reads as follows:

“(2) Service of a notice in terms of section 9(2)(d)(i) of the Act on an occupier must be effected by the sheriff within whose area of jurisdiction the land in question is situated

- (a) by reading the highlighted part of a copy of the notice to the occupier in the official language which the occupier understands best and thereafter delivering to the occupier one copy of the notice in that language and another copy in another official language, where the notice is completed on Form E in the Annexure; or”

The Regulations are published in Regulation R1632 Government Gazette 19587, 18 December 1998.

7 In terms of section 9(2)(d)(i).

8 See *Glen Elgin Trust v Titus and Another* [2001] 2 All SA 86 (LCC); *Valley Packers Co - Operative Limited v Dietloff and Another* [2001] 2 All SA 30. Compare *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another* 2001 (1) SA 1017 (LCC); [2000] 3 All SA 279 (LCC).

Non-compliance with section 13(1)(b)

[9] There is nothing to indicate whether any outstanding wages were due to the first respondent under section 13(1)(b)⁹ nor did the magistrate enquire whether an order in respect of such wages was necessary.

Non-compliance with section 19(5)

[10] The magistrate did not suspend the eviction order pending the review thereof by this court as is required by section 19(5).¹⁰

Costs order

[11] Finally, I note my concern that a costs order on an attorney and client scale was granted against the respondents in their absence and without sufficient motivation therefor. It is indeed questionable whether a punitive costs order of this nature was warranted in this matter. The magistrate failed to furnish reasons for such an order.

ACTING JUDGE Y S MEER

For the applicant:

Smit & Vermaak Incorporated, Odendaalsrus.

9 Section 13(1)(b) reads:

(1) If a court makes an order for eviction in terms of this Act-

(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”

10 Section 19(5) reads:

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

For the respondents:

Absent.