

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In Chambers: **Gildenhuys AJ**

CASE NUMBER: LCC 83R/01

MAGISTRATE-S COURT CASE NUMBER: 6491/99

In the review proceedings in the case between:

DIE LANDBOU NAVORSINGSRAAD

Plaintiff

and

KLAASEN, AJ

Defendant

ORDER

- (1) The Magistrate's order dated 14 August 2001 is set aside in full.
- (2) The case is remitted to the magistrate's court, to adjudicate on the following issues:
 - (a) whether section 9(2)(a) of the Extension of Security of Tenure Act has been complied with;
 - (b) whether section 9(2)(b) of the Extension of Security of Tenure Act has been complied with; and
 - (c) whether the notices given under section 9(2)(d) of the Extension of Security of Tenure Act, are not invalid because they were given at a time when the defendant's right of residence has not yet been terminated.
- (3) The issues must be adjudicated upon, in accordance with the following procedure:
 - (a) the plaintiff may apply to the magistrate's court by no later than 20 November 2001 for a date for the further hearing of the case, to determine the issues listed in paragraph 2 of this order;
 - (b) if such an application has been timeously made, the plaintiff may, by not later than ten days before the date for the further hearing, amend its particulars of claim, and the defendant may, by not later than five days before the date for the further hearing, amend his plea; and
 - (c) the magistrate must determine the course of any further proceedings, including the hearing of evidence, in a manner which will allow both parties adequate opportunity to present their case.

- (4) Provided an application as referred to in paragraph 3(a) has been timeously made, the presiding magistrate must determine the issues listed in paragraph 2 of this order, and in the light of his finding, the magistrate must reconsider the prayers of the plaintiff and make such order as he may deem fit.
- (5) Any eviction order which the magistrate may make consequent upon any further hearing of this case is subject to automatic review by this Court.

REGISTRAR: LAND CLAIMS COURT
29 October 2001

- (1) BY FACSIMILE TRANSMISSION AND REGISTERED POST TO:

The Magistrate
Private Bag X3045
WORCESTER
6849
Fax: (023) 347 5024

The record of the proceedings is returned by registered post.

REGISTRAR

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REGISTRAR

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NUMBER: LCC 83R/01

In chambers: **Gildenhuis AJ**

MAGISTRATE'S COURT CASE NUMBER: 6491/99

Decided on: 29 October 2001

In the review proceedings in the case between:

DIE LANDBOU NAVORSINGSRAAD

Plaintiff

and

KLAASEN, A J

Defendant

JUDGMENT

GILDENHUIS AJ:

General background

- (1) On 14 August 2001 the Magistrate at Worcester granted an eviction order against the defendant and against all persons whose right of occupation of house number 6, Hexvalley Experimental Farm, is dependent on him. The order was made in terms of the Extension of Security of Tenure Act¹ (the Tenure Act). The order comes before me on automatic review in terms of section 19(3) of the Tenure Act.
- (2) The plaintiff runs an experimental farm, also described as an outdoor laboratory, known as the Hexvalley Experimental Farm. The experiments on the farm are directed mainly at grape production. There are eight labourers' houses on the farm, used for the housing of permanent

1 Act 62 of 1997, as amended.

labourers employed on the farm. The defendant was employed on the farm and moved into one of the houses (house number 6) during February 1990.

- (3) On 1 December 1997 a lease agreement was signed between the plaintiff and the defendant. The following provisions of the lease agreement are of importance:

A1. Die verhuurder verhuur en die huurder huur hiermee die eiendom geleë te De Dooms Huis no. 6 hierna die eiendom genoem.

2. Die huurkontrak is vir ʘ tydperk van een (1) jaar vanaf die 1ste dag van November 1997.

4. Die huurgeld gedurende die huurtydperk sal ʘ bedrag per maand bedra soos saamgestel per aangehegte bylae A. . .

6. Beide die verhuurder en die huurder is geregtig om te eniger tyd die huurkontrak te beëindig deur aan die wederparty drie maande skriftelik kennis te gee. In geval waar die huurder ook ʘ werknemer is en die werknemer se dienste weens enige vorm van wangedrag beëindig word, word hierdie tydperk van kennisgewing volgens diskresie van die verhuurder verkort.

7. Die huurder onderneem om die eiendom te ontruim by diensbeëindiging of beëindiging van die kontrak.

12. Indien die verhuurder hierdie huurkontrak kanselleer en die huurder die reg om te kanselleer betwis en in okkupasie van die eiendom bly, sal die verhuurder in afwagting van die skikking of beslissing van enige eis of deur onderhandeling of deur gedingvoering geregtig wees om ʘ bedrag gelyk aan die maandelikse huurgeld waarvoor in hierdie huurkontrak voorsiening gemaak word maandeliks van die huurder te ontvang, en sodanige betaling sal nie die verhuurder se eis om kansellering, dan in geskil, benadeel en enigsins affekteer nie. Indien die geskil in die guns van die verhuurder beslis word, sal die betalings kragtens hierdie klousule gedoen en ontvang geag word om bedrae te wees wat deur die huurder betaal is ten opsigte van skade deur die verhuurder gely weens die kansellering van hierdie huurkontrak en/of die onwettige besit daarvan deur die huurder.@

- (4) On 24 February 1998 the defendant was, after a disciplinary hearing, dismissed from his employment by the plaintiff. At that time the defendant lived in house number 6 with his wife, children (some of them grown up, and not all of them his or his wife's children) and also an adult friend of his wife. The plaintiff took up the attitude that the defendant's dismissal terminated his right of occupation of the house, and called upon him and his household to move out. He failed to do so.

- (5) The plaintiff made an abortive attempt to obtain a common law eviction order against the defendant. Thereafter it commenced proceedings under the Tenure Act. The provisions of section 9(2) of Tenure Act which are relevant to this judgment read as follows:

A(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) . . .
- (d) the owner or person in charge has, after the termination of the right of residence, given-
 - (i) the occupier;
 - (ii) . . .
 - (iii) . . .

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: . . .@

Summons for an eviction order in terms of the Tenure Act was issued during September 1999.

(6) Subsequent to the defendant's dismissal, the plaintiff accepted rental payments for house number 6 from the defendant which relate to periods after the expiry date of the written lease. The defendant testified that on one occasion, after he fell in arrears with his rental payments, the plaintiff handed the matter over to attorneys, and that he paid the arrear rental to the attorneys in three instalments.

(7) The plaintiff, before issuing summons against the defendant in these proceedings, served the requisite notice in terms of section 9(2)(d)(i) of the Tenure Act on the defendant,² but not on any other resident of house number 6. The prescribed form for the notice³ contains a note to the effect that a separate notice must be served on every occupier in the household, excluding children under the age of 18. Such children must be cited in a notice served on an adult member of the household.

2 Section 9(2)(d)(i) is quoted in para [5] above.

3 The form is Form E, contained in the regulations made under section 28(1) of the Tenure Act, published in Regulation R 1632 Government Gazette 19587, 18 December 1998.

(8) Upon perusing the papers on review, I was concerned about two aspects of the case. The first is whether section 9(2)(a) and (b) of the Tenure Act was complied with. Connected thereto is the question whether the plaintiff, by accepting rental payments from the defendant after the lease in respect of house number 6 has terminated by the effluxion of its time, did not cause a new lease to come into existence. The second aspect which concerned me is whether notice in terms of section 9(2)(d)(i) should not have been served on all the adult residents in house number 6 instead of only on the defendant. Connected there to is the question whether the other residents should not have been joined in the eviction proceedings. I asked for written comments from the magistrate and submissions from both parties. The magistrate gave me his comments, and I received submissions from the attorneys of both the plaintiff and the defendant. The Court is indebted to the magistrate and to the attorneys for their input.

Was the occupier's right of residence duly terminated and notice to vacate duly given?

(9) The plaintiff's amended particulars of claim contain the following allegations:

A5. Verweerder se okkupasie van huis nr 6, Hexvallei Proefplaas, het slegs voortgespruit uit 'n diensooreenkoms tussen Eiser en Verweerder.

6. Op 24 Februarie 1998 was verweerder se verblyfreg beëindig ingevolge Artikel 8(2) van die Wet deurdat Verweerder regmatig ontslaan was ooreenkomstig die bepalings van die Wet op Arbeidsverhoudinge.

9.2 Verweerder het versuim om gemelde woonhuis te ontruim nadat Eiser op 8 September 1998 'n skriftelike kennisgewing aan Verweerder gestuur het om die woonhuis binne twee maande te ontruim.@

The defendant, in his plea, alleges that he entered into a lease with the plaintiff. He denies that his right of occupation arose solely from his employment agreement, and he also denies that his right of occupation has been lawfully terminated. At the hearing in the magistrate's court, he produced a written lease agreement.⁴

4 The written lease agreement is the agreement from which I quoted in para [3] above.

(10) Evidence was given by Ms Freislich on behalf of the plaintiff that lease agreements in respect of houses on the farm are only concluded with persons who are employed on the farm, and that no lease agreement would have been entered into with the defendant if he had not been an employee at the time. On this basis, the magistrate found that defendant's right of residence arose solely from his employment contract. I do not agree. The employment contract constitutes nothing more than the motive for concluding the lease agreement: the source and origin of the defendant's right to occupy house number 6 is the lease agreement. Although the lease agreement might never have been concluded if the defendant had not been employed on the farm, the termination of the employment contract does not by itself put an end to the lease agreement.

(11) The lease agreement contains conflicting provisions on what happens when the defendant's employment by the plaintiff comes to an end. Under clause 7, he undertook to vacate the house. Under clause 6, it would seem that notice of termination of the lease is necessary, also where defendant's employment came to an end. Applying the *contra proferentem* rule,⁵ it would appear to me that if the plaintiff wants to terminate the lease before it expires in terms of clause 2, he must give notice to that effect.

(12) The plaintiff apparently called upon the defendant to vacate the house by a letter dated 8 September 1998. There is no copy of the letter in the record before me. On 8 September 1998 the lease had not yet expired.⁶ It expired by the effluxion of its time on 31 October 1998. According to the submissions made on behalf of the defendant, the letter of 8 September 1998 did not purport to cancel the lease: in fact, it contains no reference to the lease.

(13) Section 8(1) and (2) of the Tenure Act deals with the termination of an occupier's right of residence. The relevant portions read as follows:

5 According to this rule, a contract and its terms must, in cases of doubt, be construed against the contracting party by whom it was formulated. See *Faure and Another v Joubert and Another* 1979 (4) SA 939 (A) at 948G-H.

6 Its term has not yet expired, and there is no evidence that notice of earlier termination of the lease was given. Such a notice, if given, must be clear: see *Swart v Vosloo* 1965 (1) SA 100 (A) at 104H.

A(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) . . .
- (c) . . .
- (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) . . .@

(14) It would seem that a specific cancellation of an occupier's right of residence is required under section 9(2)(a), even where the agreement from which the right is derived was cancelled, or has expired by the effluxion of its time.⁷ Consent to an occupier to reside on land may only be terminated in accordance with the provisions of section 8(1) or (2) of the Tenure Act.⁸ If the underlying contract containing the consent expired or was cancelled but its termination does not comply with any of the norms of section 8(1) or (2) (for example, where the clause allowing the cancellation is unfair), the consent to reside will continue by operation of law, even though the contract containing the consent came to an end.

(15) The above conclusion is bolstered by section 11(1) of the Tenure Act. Section 11(1) reads as follows:

A(1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.@

7 In this case, the agreement from which the right of residence was derived, is the lease. In other cases it might be derived from the employment contract. Section 8(1)(d) indicates that the expiry of the agreement from which the right of residence arises, does not *ipso facto* terminate the right of residence.

8 Section 3(1) of the Tenure Act. See also n 28 below.

If, in circumstances as envisaged in section 11(1), it would not be just and equitable for a court to grant an eviction order, the consent to reside will continue by operation of law, despite the termination of any underlying contract.⁹

⁹ Section 11(1) does not apply to the defendant. He became an occupier long before 4 February 1997, albeit not under the present lease.

(16) Ordinarily, after a lease has expired, the acceptance of rent for a subsequent period would constitute a new, implied lease.¹⁰ See *Pritchard v Joffe*¹¹ and *Ralph v Hayes*.¹² In this case the acceptance of rent¹³ and particularly the handing over to attorneys of a claim for rent in respect of periods subsequent to the termination of the original lease could indicate that the plaintiff accepted that a new lease (albeit a tacit lease) came into existence. This could be the position even if the original right of residence arose from the employment agreement.

(17) As the plaintiff's attorney correctly pointed out in her submissions, the question of a new lease was not properly ventilated in the proceedings before the magistrate. The plaintiff may be able to show that the payments were received as damages pursuant to clause 12 of the lease (if that was the intention,

10 Lotz & Joubert (ed) *Law of South Africa* 1st Reissue, Vol 14 (Butterworths, Durban 1999) at para 217; Kerr *The Law of Sale and Lease* 2nd ed (Butterworths, Durban 1996) at 450-452.

11 1931 CPD 337 at 340.

12 1948 (1) SA 46 (N) at 49.

13 During the hearing in the magistrate's court, receipts were handed up dated 15 September 1999, 23 November 1999, 19 January 2000, 10 March 2000, 8 June 2000, 19 July 2000, 14 August 2000, 19 September 2000 and 15 January 2001.

and if that clause is valid in law¹⁴), or pursuant to an agreement under section 8(7)(a) of the Tenure Act,¹⁵ and that the verbal demands made to the defendant to vacate the house together with the cutting off of his electricity, could leave him in no doubt that the plaintiff regards the lease as cancelled and his right of residence as at an end.

14 The defendant submitted that the clause is *contra bonos mores*, unconstitutional and invalid. I make no comment on the correctness of these submissions.

15 Section 8(7)(a) reads as follows:

A(7) If an occupier's right to residence has been terminated in terms of this section, or the occupier is a person who has a right of residence in terms of subsection (5) -

- (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.®

(18) The record given to me does not contain all relevant documents. The issue of cancellation of the defendant's right of residence was not considered fully, possibly because the right of residence was wrongly conceived to be inextricably linked to his employment contract. In my view, it would be just and equitable to remit the case to the magistrate's court to determine whether section 9(2)(a) and (b) of the Tenure Act was properly complied with. In this connection it must be borne in mind that if the right of residence was terminated only after the section 9(2)(d) notices were given, the section 9(2)(d) notices will be invalid, because they can only be properly given after the right of residence was terminated.¹⁶ If the notice to vacate under section 9(2)(b) was given when the defendant's right of residence was still in existence, it would be similarly invalid. The notice to vacate which must be given under section 9(2)(b) is a discrete notice, to be given in addition to the notice of intention to obtain an eviction order required under section 9(2)(d).

Must section 9(2)(d)(i) notices be served on all adult members of an occupier's household?

(19) A notice of intention to obtain an eviction order must be given to every **Occupier**.¹⁷ Accordingly, if the members of an occupier's household are not themselves **Occupiers**, service of notices on them will not be required. The term **Occupier** is defined in section 1 of the Tenure Act as follows:

A person residing on land which belongs to another person, and who has on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-

- (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996);
- (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
- (c) a person who has an income in excess of the prescribed amount.

16 Section 9(2)(d) notices may only be given after the termination of the right of residence. See the wording of the subsection as quoted in para [5] above.

17 See section 9(2)(d)(i), quoted in para [5] above.

The key to the definition, in my view, lies in the meaning to be given to the words *consent* and *another right in law*. A person who does not have consent or another right in law to reside on the land, is not an *occupier* (as defined).

(20) The Tenure Act contains the following definition of *consent* in section 1(1):

Express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, includes the express or tacit consent of such holder.

The primary meaning of consent, according to the *New Shorter Oxford English Dictionary*,¹⁸ is *voluntary agreement to*. Harms JA found that the word *consent* had that meaning in a suretyship contract, which the Court was called upon to interpret in *Tsaperas and Others v Boland Bank Ltd*.¹⁹ In *Standard Bank of SA Ltd v Neugarten and Others*²⁰ Goldblatt AJ held that consent by a company to provide security, given by the directors of the company in the form of a resolution, constitutes a

18 Brown (ed) *The New Shorter Oxford English Dictionary on Historical Principles* Vol 1 (Clarendon Press, Oxford 1993).

19 1996 (1) SA 719 (A) at 724G/H: *The argument ignores the meaning of 'consent'. Its primary meaning as a noun is, according to The Concise Oxford Dictionary, 'voluntary agreement'.*

20 1988 (1) SA 652 (W) at 659J-660A.

contract. In *Dhanabakium v Subramanian and Another*,²¹ Tindall JA held that a mother's consent to the adoption of her child will not be valid unless she is a person competent to enter into a contract. If she is a minor she must be assisted by her guardian when granting any such consent.

21 1943 AD 160 at 167.

(21) There are two parties to any consent: the party giving it and the party receiving it. Consent, as envisaged in the definition of *‘‘occupier’’* contained in the Tenure Act, is more than a mere indication of the inclination of the grantor. It creates legally enforceable rights and obligations between the grantor and the recipient. The requirement of the Tenure Act that an occupier must have or must have had consent to reside on the land, means that the person concerned must be or must have been a party to a consent agreement with the owner of the land or with the person in charge,²² or with the predecessor in title of any of them.²³ The notion of an agreement from which the consent to reside originates, appears from the wording of section 8(1)²⁴ (which deals with the termination of an occupier’s right of residence²⁵) and is also found in sections 10(1)(b), 11(1), 11(3)(b) and 12(2)(a) of the Tenure Act.

(22) A person who does not have consent may be an *‘‘occupier’’* by virtue of *‘‘another right in law’’* to reside on the land.²⁶ The Tenure Act contains no definition of *‘‘another right in law’’*. It is difficult to envisage what was contemplated by those words.²⁷ It could be a right derived from the operation of law.²⁸ The wording indicates that it is a legal right.²⁹ Being a legal right, there must be a holder who is entitled to it, and a person or persons who are subject to it.

22 Section 1 of the Tenure Act contains the following definition of *‘‘person in charge’’*:

‘‘A person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question.’’

23 Section 24 of the Tenure Act.

24 The relevant portions of section 8(1) is quoted in para [13] above.

25 See the words *‘‘agreement . . . on which the owner or person in charge relies’’* in section 8(1)(a), and the words *‘‘agreement from which the right of residence arises’’* in section 8(1)(c).

26 See the definition of *‘‘occupier’’* quoted in para [19] above.

27 See Roux in Budlender *et al*, *Juta’s New Land Law*, 2000 service (Juta, Cape Town 1998) at 7A-13.

28 Section 3(1) provides that consent to reside may only be terminated in accordance with section 8. Section 8(1) allows the termination of a right of residence if the termination is just and equitable. There is no reference to *‘‘consent’’*. Section 8(1)(e) enjoins the court to consider the reasonable expectations of the renewal of the agreement from which the right of residence arises when considering if the termination of a *‘‘right of residence’’* is just and equitable. The correlation between the termination of *‘‘consent’’* of a *‘‘right of residence’’* and of a *‘‘contract from which a right of residence arises’’*, is not clear. The seemingly discordant use of these terms can best be attuned by accepting that an *‘‘agreement from which a right of residence arises’’* may terminate at a time when it will not be just and equitable to bring the *‘‘right of residence’’* to an end. The *‘‘consent’’* to reside will then endure by operation of law, and provide a new basis for the *‘‘right of residence’’*. The words *‘‘another right in law’’* might refer to such a new basis.

29 The requirement that *‘‘another right’’* must be *‘‘a right in law’’* support my previous finding that *‘‘consent’’* must also be a right in law.

(23) A person residing on land will not be an occupier (as defined) unless there is a legal *nexus* between that person and the owner or person in charge of the land. There is no such *nexus* between family members living with that person on the one hand, and the owner or person in charge of the land on the other hand. The family law rights of the family members do not turn them into occupiers.³⁰ This is pointed out by Roux in *Juta's New Land Law*.³¹

Under the ESTA, unlike the Labour Tenants Act, an occupier's dependants are not accorded any particular status. . . If an occupier's dependants are able to prove that they meet the definition of occupier, they will be entitled to protection in their own right.

30 See *Venter NO v Claasen en Andere* 2001 (1) SA 720 (LCC) at para [11]; *Dique NO v Van der Merwe en Andere* 2001 (2) SA 1006 (T) at 1011D-H.

31 Above n 27.

Note, however, that in terms of s 6(2)(d) occupiers . . . have the right to family life. One of the implications of this provision is that occupiers have the right to have members of their family stay with them on a permanent basis. Although this may not necessarily result in these people becoming or retaining their status as occupiers, they may not be evicted for as long as the occupier with whom they are staying remains on the land. The question whether a particular person counts as a family member depends on the culture of that [ie the occupier's] family.³²

(24) The scope of the term 'occupier' can best be illustrated with reference to particular examples. I will use the example of a farm owner who employs a labourer to work on his farm and, as a term of his employment contract, allows him to occupy a house on the farm. If the labourer moves into the house with his wife and children, the occupation by the wife and children would be lawful by virtue of the labourer's right to family life in terms of the Tenure Act,³³ but the wife and children would not become 'occupiers' in their own right.³⁴ If the employment contract allows the labourer to have his wife and children or a friend living with him in the house, that contract would not make the wife and children or the friend 'occupiers', because the wife and children and the friend are not parties to the agreement that constitutes the consent. The person who holds the consent is the labourer himself, and the wife's, children's or friend's right of residence is under or through the labourer. The labourer may allow them to reside in the house by virtue of the consent given to him by the owner or person in charge. If the labourer wants to evict the friend, the friend will not be entitled to any protection under the Tenure Act. On the other hand, if the farm owner gives consent to live in the house directly to the labourer's wife,

32 Above n 27 at 7A-15 and 7A-16.

33 Section 6(2)(d) of the Tenure Act reads:

A(2) Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right-

...
(d) to family life in accordance with the culture of that family. . . .

34 See para [23] above.

that would make her an occupier in her own right. Such consent will, in practice, sometimes be given when the wife is also employed on the farm.³⁵ Only in such cases will the wife be an occupier in her own right, with the same entitlements under the Tenure Act as her husband.

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

(25) It might be argued that family members of a labourer who has consent to live in the house, derive the right to do so from the provisions of the Tenure Act. That **Aright@**, so such an argument could run, constitutes **Aanother right in law@** to reside on the farm, and brings the family members within the scope of the definition of **Aoccupier@**. In my view, such an argument would be fallacious.³⁶ The right to **Afamily life@** is a right in terms of the Tenure Act given to the labourer, in his capacity as **Aoccupier@** (as defined). It is not given to his family members.³⁷ The family members have family law rights against the labourer, not against the owner or person in charge. The Tenure Act, by allowing **Afamily life@** to the labourer, enables him to fulfil his family law obligations. The labourer (as the occupier) determines which family members (if any) will live with him on the farm. A family member who considers himself or herself entitled to live with the labourer on the farm (such as a spouse wanting to share a matrimonial home) must enforce that right against the labourer, not against the owner or person in charge of the farm.

(26) If an eviction order is given against an occupier, the general rule is that the sheriff may remove from the farm any person claiming through or under such occupier.³⁸ It does not matter that the order

36 Roux, in *Juta v New Land Law* above n 27 at 7A-13, seems to conclude in his footnote 3, correctly so in my view, that the term **Aanother right in law@** does not include a right in terms of family law which a live-in dependent might have against an occupier. See also the decisions referred to in n 30 above.

37 See the wording of section 6(2)(d) of the Tenure Act, quoted in n 33 above.

38 *Ntai and Others v Vereniging Town Council and Another* 1953 (4) SA 579 (A) at 584 and 590.

in not granted against such other person by name.³⁹ There is a presumption that new statutory law does not alter existing rules of law more than is necessary.⁴⁰ There is insufficient

39 *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C) at 635H-J:

¶To the extent that sub-tenants, guests and family are made to obey an order which is not granted against them by name, I suppose it may be regarded as an exception to the general rule that an order operates only against the person to whom it is addressed *inter alios iudicatas aliis non praejudicare*.@

40 Du Plessis ¶Statute Law and Interpretation@in Joubert (ed) *Law of South Africa* 1st reissue Vol 25 (Butterworths, Durban 1999) at para 328.

indication in the Tenure Act that it was intended to change this general rule of law.⁴¹ On the contrary, provisions in the Tenure Act itself support the view that an eviction order against an **Occupier@** (as defined) is also operative against family members living with that occupier. I will give two illustrations.

(27) The first illustration can be found in sections 12(1) and 12(2) of the Tenure Act. The relevant portions of the sections read:

- A**(1) A court that orders the eviction of an occupier shall-
- (a) determine a just and equitable date on which the occupier shall vacate the land; and
 - (b) . . .
- (2) In determining a just and equitable date the court shall have regard to all relevant factors, including-
- (a) . . .
 - (b) the balance of interests of the owner or person in charge, the occupier and the remaining occupiers on the land; and
 - (c) . . .@

It is evident that the words **Athe occupier@** mean a person who has or have had consent or another right in law to reside on the land, whilst **Athe remaining occupiers@** refer to the other members of the first-mentioned occupier=s household residing with him on the land.⁴² This section recognises by implication

41 Before an eviction order may be granted against an **Occupier@**, there must be compliance with one of the subsections of section 10 or with one of the subsections of section 11. Section 10(3) is the only subsection that refers to eviction orders against persons whose permission to reside is dependent upon the occupier=s right of residence. The relevant part of section 10(3) is quoted in para [30] below. It is obvious that, in cases where an eviction order was granted against an occupier upon compliance with a different subsection of section 10 or 11, that order will also allow the removal of persons whose permission to reside is dependent upon such occupier. The reference to eviction orders against such other persons, which occur only in section 10(3), is probably *ex abundanti cautela*.

42 The same distinction also occurs in section 10(3) of the Tenure Act. See n 41 above.

that an eviction order made against **A**an occupier[@] is also operative against the **A**remaining occupiers[@] (namely members of **A**the occupiers^{s@} household), because their interests must be considered in determining the vacation date.

(28) A second illustration can be found in section 12(4) of the Tenure Act, which reads:

A(4) Any order for the eviction of an occupier in terms of section 10 or 11 shall be subject to reasonable terms and conditions for further residence which may be determined by the court, having regard to the income of all of the occupiers in the household.[@]

The above wording indicates that the legislature realised that an eviction order against **A**an occupier[@] will also entail the eviction of **A**all the occupiers in the household[@] (meaning all members of household). If all members of the household were occupiers in their own right (that is, persons having or having had consent or another right in law to reside on the land), an eviction order against one of them could not possibly be operative against the others.

(29) It is apparent from the above two illustrations that the word **A**occupier[@] is used indiscriminately in the Tenure Act. The statutory definition of **A**occupier[@] in section 1(1) only applies if the context in which the word is used, does not indicate some other meaning.⁴³ After analysing a number of court decisions, Davies J in *Canca v Mount Frere Municipality*⁴⁴ formulated the approach to be adopted when determining whether another meaning was intended, as follows:

43 See the first sentence of section 1(1) of the Tenure Act.

44 1984 (2) SA 830 (TkS).

The principle which emerges is that the statutory definition should prevail unless it appears that the Legislature intended otherwise and, in deciding whether the Legislature so intended, the Court has generally asked itself whether the application of the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply.⁴⁵

(30) I will proceed to point out some more examples of where the word **Occupier** carries a meaning in the Tenure Act which is different from its defined meaning. Firstly, the definition of **Suitable alternative accommodation** in section 1(1) requires regard to be had to the **Reasonable needs and requirements** of all the occupiers in the household to determine whether any available alternative accommodation is suitable. The intention is obviously that the needs and requirements of all members of the household must be considered, not only the needs and requirements of those members who are also occupiers. Secondly, sections 8(7)(b) and 12(4) of the Tenure Act, which allows a court to determine reasonable terms and conditions of residence **having regard to the income of all occupiers in the household**, is clearly intended to refer to everybody forming part of the household (whether they are occupiers as defined, or not). Lastly, in section 10(3) of the Tenure Act the word **Occupier** is used two different senses, each with obviously discrete meanings. The subsection provides that:

(3) . . . 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) . . .
- (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 words **the occupier**, where it first occurs, clearly refer to an occupier as defined (that is, an occupier who has consent from the owner or person in charge of the land, or another right in law to reside on the land), whilst the words **any other occupier** and **the remaining occupiers** refer to other residents living in the same dwelling, whose permission to reside there is wholly dependent on the right of residence of the first-mentioned **Occupier**. If the term **Occupier** was intended to carry the same meaning throughout, the distinctions made in section 10(3) would not have been necessary.

45 Above n 44 at 832F.

(31) I have given consideration to a possible interpretation of the Tenure Act which will give the word *occupier* a wide meaning, inclusive of all members of the household of a person who has consent or another right in law to reside on the land. Such an interpretation will allow the same meaning to be given to *occupier*, wherever it occurs in the Tenure Act.⁴⁶ The wording of the Tenure Act itself however, does not support such an interpretation. It would also create incongruities. It is regrettable that the legislature obfuscated the Tenure Act, which is difficult enough to interpret, even more by using a defined term not consistently, but with discrepant meanings.

⁴⁶ There is a presumption that the same words and phrases in a statute bear the same meaning throughout. See Du Plessis above n 40 at para 335: *This* presumption, rightly or wrongly, trust legislatures= propensity to use language consistently. Sometimes (as in this case), the trust is misplaced.

(32) I will proceed to point out some of the incongruities. Firstly, the definition of "Occupier" excludes a person who has an income in excess of the prescribed amount.⁴⁷ If a farm labourer receives permission to occupy a house on a farm and has a wife living with him who earns more than the prescribed amount from employment in town, the wife would be excluded from the definition of "Occupier". Her exclusion will require her income to be disregarded when the income of all occupiers in a household has to be considered under section 8(7)(b) for purposes of determining terms and conditions of residence. That would be patently unfair. Another incongruity may be found in section 9(2)(a) of the Tenure Act. Section 9(2)(a) requires that an occupier's right of residence must be terminated before an eviction order can be granted against that occupier. If every member of a farm labourer's household is an occupier, each one of them will have an independent right of residence.⁴⁸ If the farm labourer's right of occupation arises solely from his or her employment agreement, that right of residence may be cancelled under section 8(2) if he or she resigns or is dismissed. The "right of residence" of the other members of the household would then have to be separately cancelled. If there are no lawful grounds to cancel their individual "rights of residence", the incongruous situation will arise that family members will be allowed to remain on the farm, and as part of their right to family life, they will be allowed to bring the evicted farm labourer back to live with them.⁴⁹ This could never have been the intention of the legislature. Lastly, if the defined term "Occupier" has to be given a wide interpretation that would include spouses and dependants, it would mean that the right of residence of a parent who has lived on the land for ten years and who is older than sixty years, may by virtue of the provisions of section 8(4)(a) of the Tenure Act⁵⁰ not be terminated. That will be so, notwithstanding that his or her

47 Para (c) of the definition contained in section 1(1) of the Tenure Act, quoted in para [19] above. The prescribed amount is R5000,00 per month. See the regulations referred to in n 3 above.

48 Section 6(1) of the Tenure Act.

49 Section 6(2)(d) of the Tenure Act.

50 Section 8(4) reads as follows:

(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,

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.

son who works on the farm and from whose service contract the consent to reside is derived, has not yet reached the age of 60 years. Such a result could never have been the intention of the legislature, as is evident from the special provisions relating to spouses and dependants in section 8(5).⁵¹ If such spouses and dependants were also intended to be **Occupiers** (as defined), section 8(5) would not have been included in the Tenure Act.

(33) The conclusion is inevitable that the word **Occupier** is used in the Tenure Act in two senses: firstly, in a narrow sense, meaning persons who are or were parties to a consent agreement with the owner or person in charge of the land or who are the bearers of another right in law to reside, and secondly in a wide sense, meaning residents who derive their rights to reside through or under occupiers in the narrow sense. The latter group falls outside the statutory definition of **Occupier**.

51 Section 8(5) of the Tenure Act reads as follows:

8(5) On the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10 (1).[@]

(34) The members of an occupier's household will not be disempowered by my interpretation of the Tenure Act. Various sections of the Act require their position to be considered by the court when determining conditions of residence, or when making eviction orders.⁵² They have the right to live with the occupier for as long as the occupier remains entitled to reside on the land and remains entitled to family life.⁵³ To succeed in an action for eviction against a household member, the owner or person in charge will have to show either that the occupier himself no longer enjoys protection from eviction under the Tenure Act⁵⁴ or that there are other legally justifiable grounds⁵⁵ warranting the eviction.⁵⁶ Until that happens, family members of an occupier may, generally speaking, defend themselves against a threatened eviction on the same substantive grounds as may be available to the occupier.⁵⁷

(35) Section 3(4) of the Tenure Act does not militate against these conclusions. It reads as follows:

AFor the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.@

The term Aconsent@ is defined as the express or tacit consent of the owner or person in charge of the land.⁵⁸ Consent must originate from an agreement,⁵⁹ or exist by operation of law.⁶⁰ The presumption in section 3(4) will not generate consent. It does nothing more than cast an *onus* on the owner or person in charge to prove that consent does not exist, if that is the case. The presumption will not turn

52 See, for example, sections 8(7)(b), 10(3), 11(3)(a), 12(2)(b) and 12(4). I have dealt with most of these subsections elsewhere in my judgment.

53 The position, in my view, is similar to a situation where the lessor under a headlease seeks to evict a subtenant of the lessee. He cannot do so whilst the headlease remains in good standing. See *Singer and Others v Combrink and Another* 1950 (1) SA 764 (O) at 772 and *Bright v Triumph Garage (Pty) Ltd* 1949 (3) SA 352 (C) at 360-361.

54 Compare *Ntai* above n 38 at 584A-C.

55 Such a legally justifiable ground might conceivably be misbehavior by the household member as envisaged in section 6(3), or if the household member is not family of the occupier, as contemplated in the culture of that family. See also para [36] below.

56 Compare *United Building Society v Rabinowitz and Others* 1949 (4) SA 513 (C) at 518.

57 The rights of the family members do not include the right to receive notices or to be joined in legal proceedings which the owner or person in charge may bring against the occupier.

58 See the definition of Aconsent@ in section 1(1) of the Tenure Act, quoted in para [20] above.

59 See para [21] above.

60 See n 28 above.

household members dependent on an occupier for permission to live on the land, into occupiers (in their own right) of the land.

(36) It might be asked on what basis would the owner or person in charge be entitled to eject a spouse or dependant of an occupier[@] (as defined) for misbehaviour, for example if the spouse or dependant breaches a provision of section 6(3) of the Tenure Act.⁶¹ Section 6(3) is clearly intended to apply to all members of an occupier's household. If it is breached, there could be two possible consequences. The first is that such breach, being committed by a person who resides on the land through or under the occupier concerned, constitutes a breach of the occupier's terms of residence, and that such breach could support an eviction application against the occupier and his entire household.⁶² The second interpretation could be that the breach removes the right of the spouse or dependant to rely on the occupier's right of residence to support their own right, and that such spouse or dependant could then be evicted. The proviso at the end of section 8(5) might give some support to such an interpretation. For purposes of this case, I need not choose between the two possibilities.

61 Section 6(3) reads as follows:

^An occupier may not-

- (a) intentionally and unlawfully harm any other person occupying the land;
- (b) intentionally and unlawfully cause material damage to the property of the owner or person in charge;
- (c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or
- (d) enable or assist unauthorised persons to establish new dwellings on the land in question.[@]

62 The position could be compared to that of a headlessee facing the cancellation of his headlease through the conduct of his subtenant, in circumstances where that particular kind of conduct would constitute a breach of the headlease. Compare *Wistyn Enterprises (Pty) Ltd v Levi Strauss & Co and Another* 1986 (4) SA 796 (T) at 802B-C.

(37) In terms of section 9(2)(d) of the Tenure Act, the owner or person in charge must, before application can be made for the eviction of an occupier, give advance notice (which must contain the prescribed particulars) to every occupier concerned. In my view, this subsection applies only to *occupiers* as defined, that is to persons who are *occupiers* in the narrow sense.⁶³ It does not include members of an occupier's household who are dependent upon the occupier's right for their own right to reside on the land. That means that each member of such a household need not be separately served with a notice in terms of section 9(2)(d).

63 The context does not indicate that it is used in any other sense. See para [29] and [33] above.

(38) The regulations under the Tenure Act prescribe the form which a notice under section 9(2)(d) must take.⁶⁴ The prescribed form contains the following note:

Note: a separate notice must be served on every occupier in the household, excluding children under the age of 18. Children under the age of 18 can be cited in a notice served on an adult member of the household in which they are ordinarily resident.⁶⁵

If by Occupier is meant an occupier as defined in the Tenure Act, I have no quarrel with the note. If Occupier in the household is intended to be synonymous with Member of the household, the regulations would impose a burden on the owner or person in charge which extends beyond the duty imposed under section 9(2)(d). The Minister may prescribe the particulars to be contained in a notice under section 9(2)(d) and also its form and the manner of service.⁶⁵ In my view, the Minister has no power to make regulations that require service of such a notice on persons who are not required to be served therewith under the Tenure Act itself.⁶⁶ The legislature dealt with the question of which persons must be served with notices. The Minister may not, in the regulations, also deal with that issue, since it would, in the words of Van den Heever J in *S v Van der Horst and Others*, presupposes that the Minister may by regulation provide better than Parliament itself has expressly done.⁶⁷ If the Minister, in the regulation, intended to impose a requirement that section 9(2)(d)(i) notices must also be served

64 See n 3 above.

65 Section 28(1)(b) of the Tenure Act.

66 Such a power would imply that the Minister may in effect amend section 9(2)(d) by extending the statutory list of persons on whom notices must be served. The power to amend statutes by regulation must not be lightly implied: *Van Heerden and Others NNO v Queen's Hotel (Pty) Ltd and Others* 1973 (2) SA 14 (RA) at 27E. In this case, I find no such implied power given to the Minister.

67 1991 (1) SA 552 (C) at 556C.

also on persons who fall outside the statutory definition of "occupier" such requirement would be *ultra vires* the enabling legislation⁶⁸ and invalid. It follows that, although no section 9(2)(d)(i) notices were served on the other members of defendant's household, section 9(2)(d)(i) of the Tenure Act had been complied with, unless the notices were served prematurely.

68 Regulations which are *ultra vires* its enabling legislation are invalid: see *Vereeniging City Council v Rhema Bible Church, Walkerville* 1989 (2) SA 142 (T) at 149C-D and *R v Lusu* 1953 (2) SA 484 (A) at 489A-F.

(39) Because the sheriff is entitled to remove from the land any person claiming through or under an occupier against whom an eviction order was made,⁶⁹ it is not necessary to join household members who are not also occupiers in their own right in eviction proceedings against an occupier,⁷⁰ nor is it necessary to refer to such household members by name in the eviction order itself.

Conclusion

(40) For the reasons set out above:

- (1) The Magistrate's order dated 14 August 2001 is set aside in full.
- (2) The case is remitted to the magistrate's court, to adjudicate on the following issues:
 - (a) whether section 9(2)(a) of the Extension of Security of Tenure Act has been complied with;
 - (b) whether section 9(2)(b) of the Extension of Security of Tenure Act has been complied with; and
 - (c) whether the notices given under section 9(2)(d) of the Extension of Security of Tenure Act, are not invalid because they were given at a time when the defendant's right of residence has not yet been terminated.

69 See para [26] above.

70 See para [24] above.

- (3) The issues must be adjudicated upon, in accordance with the following procedure:
 - (a) the plaintiff may apply to the magistrate's court by no later than 20 November 2001 for a date for the further hearing of the case, to determine the issues listed in paragraph 2 of this order;
 - (b) if such an application has been timeously made, the plaintiff may, by not later than ten days before the date for the further hearing, amend its particulars of claim, and the defendant may, by not later than five days before the date for the further hearing, amend his plea; and
 - (c) the magistrate must determine the course of any further proceedings, including the hearing of evidence, in a manner which will allow both parties adequate opportunity to present their case.
- (4) Provided an application as referred to in paragraph 3(a) has been timeously made, the presiding magistrate must determine the issues listed in paragraph 2 of this order, and in the light of his finding, the magistrate must reconsider the prayers of the plaintiff and make such order as he may deem fit.
- (5) Any eviction order which the magistrate may make consequent upon any further hearing of this case is subject to automatic review by this Court.

ACTING JUDGE A GILDENHUYS

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