IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC 84R/01
In Chambers: **Bam AP** **MAGISTRATE'S COURT CASE NUMBER**: 33/2001

Decided on: 11 December 2001

In the review proceedings in the case between:

THEEWATERSKLOOF HOLDINGS (PTY) LTD, GLASER DIVISION Applicant

and

STEVENS, A First Respondent

STEVENS, M Second Respondent

JUDGMENT

BAM AP:

Background

[1] This matter came before me by way of automatic review in terms of section 19(3) of the Extension of Security of Tenure Act[1] (hereinafter referred to as "ESTA"). The matter was referred to this Court together with two other matters, namely *Theewaterskloof Holdings (Pty) Ltd, Glaser Division v Jacobs and Others*[2] and *Theewaterskloof Holdings (Pty) Ltd, Glaser Division v Noble and Another*.[3] I will refer to these two cases respectively as "the *Jacobs* case" and "the *Noble* case" The facts of these two cases are in many respects identical to the present matter. All three cases were applications for eviction orders brought by the same applicant in the Grabouw Magistrate's Court and

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1 Act 62 of 1997, as amended.

2 LCC 91R/01, 19 October 2001, Internet web site http://www.law.wits.ac.za/lcc/2001/91r01sum.html.

3 LCC 92R/01, 19 October 2001, Internet web site http://www.law.wits.ac.za/lcc/2001/92r01sum.html.

in all three instances eviction orders were granted. Judgment has already been handed down in the other two cases.[4]

Authority to act on behalf of applicant

[2] As explained in the previous two cases brought by the applicant, a person acting on behalf of a company must prove that he or she is duly authorised to act on behalf of that legal *persona*.[5] *In casu* the deponent to the founding affidavit, Mr A J van As, has failed to prove that he is authorised to act on behalf of the applicant.

Failure to serve notice to vacate

[3] For an eviction order to be granted an applicant must comply with the various requirements set out in section 9(2) of ESTA.[6] With regard to the first requirement, the first respondent was retrenched and he did not declare a labour dispute regarding his retrenchment. It is clear that the first respondent's right of residence was solely dependent on his employment contract, which was duly terminated as

4 The decisions were those of my colleague, Gildenhuys AJ.

5 See para [4] of the *Jacobs* case and the *Noble* case, respectively.

6 The relevant parts of section 9(2) read as follows:

"(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 . . ."

required by section 8(2).[7] It is, however, not clear that the right of residence of the respondent was independently terminated as required by section 9(2)(a). The applicant's papers also do not aver that the required notice to vacate the farm in terms of section 9(2)(b) was given to the first respondent, and it might be that no such notice was in fact given. The termination of the right of residence and notice to vacate must be given seperately from the termination of the employment contract, despite the fact that the first respondent's right of residence stemmed from his employment.[8] On the papers I cannot find compliance with sections 9(2)(a) and 9(2)(b).

Failure to comply with section 10

[4] Section 10 applies to this case since the first respondent was an occupier on 4 February 1997. Mr van As, merely stated that section 10 of ESTA is applicable. He does not say on which subsection of section 10 the applicant is relying.[9] In a supplementary affidavit, Mr van As stated that:

> "'n Aspek wat nie uit die oog verloor moet word nie is die feit dat die respondent soos gemeld in my eedsverklaring geheg by die Kennisgewing van Mosie onwettig handel dryf in drank vanaf die applikant se eiendom.[[10]] Hierdie insident het plaasgevind na die gemelde afdanking en enige vertrouensverhouding tussen die applicant en die respondent is daardeur onherroeplik geskaad. Die eeerste respondent het persoonlik ook erken aan 'n mede plaasbestuurder, mnr Willem Booysen, dat hy wel handel dryf in drank."[11]

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7 Section 8(2) and (3) of ESTA reads:

"(2) The right of residence of an occupier who is an employee and whose right of residence arises solely froman 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."

8 See *ABJ Boerdery v Mzamo and Another*, LCC 46R/01, 9 April 2001, [2001] JOL 8104 (LCC), Internet web site http://www.law.wits.ac.za/lcc/2001/46r01sum.html at para [5].

9 See *Du Toit v George and Another*, LCC 31R/01, 28 February 2001, [2001] JOL 8184 (LCC), Internet web site http://www.law.wits.ac.za/lcc/2001/31r01sum.html at para [17]; *Alberts v Sibiya*, LCC 66R/99, 4 November 1999, [1999] JOL 5721 (LCC), Internet web site http://www.law.wits.ac.za/lcc/1999/albertsum.html at para [9].

10 The founding affidavit in the Notice of Motion merely stated:

"'n Verdere aspek wat ek onder die Hof se aandag wil bring is dat die eerste Respondent tans onwettig handel dryf in drank vanaf die Applikant se woning wat tot nadeel strek van die werkers van die Applikant."

11 A supporting affidavit by Mr Willem Booysen was attached to the papers.

From the wording "vertrouensverhouding",[12] it can be inferred that the applicant is relying on subsection 10(1)(c) of ESTA, which reads as follows:

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

I am not convinced that the above statement of the applicant is sufficient to justify an eviction under the mentioned section. It does not explain how the conduct of the first respondent resulted in a fundamental breach of the relationship.[13] Furthermore, the first respondent's right of residence was terminated due to the fact that the applicant retrenched him as a result of the applicant's economic and operational reasons, not because he was dealing unlawfully with alcohol.

[5] If an occupier cannot be evicted under section 10(1) of ESTA, an owner or person in charge, seeking an eviction order, must rely on sections 10(2) or 10(3) of ESTA. Subsection 10(2) provides:

> (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.

While the section 9(3) report,[14] did state that there is no accommodation available through the municipality of Grabouw, it did not address the issue of whether or not there is suitable alternative accommodation available to the respondents in some other form.[15] At the hearing in the magistrate's court, the first respondent (who was not legally represented) made the following statement:

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12 "Vertrouensverhouding" can be translated to "trust relationship". The appropriate wording in the Afrikaans text of section 10(1)(c) of ESTA is "wesenlike verbreking van die verhouding".

13 See for example *Malan v Bailey and Others*, LCC 76R/01, 15 August 2001, [2001] JOL 8622 (LCC), Internet web site http://www.law.wits.ac.za/lcc/2001/76r01sum.html at para [4].

14 See para [8] hereunder.

15 For example, whether the respondents could have stayed with a family member.

> "As ek die huis moet leegmaak, waarheen moet ek gaan. Ek was al hoeveel maal bo by die Munis. Hulle sê ek moet wag."

The first respondent is only saying that the municipality cannot accommodate him and his family, he did not advise of any other possibilities. While it is not clear that there is no suitable alternative accommodation, I am not satisfied that suitable alternative accommodation is available to the respondents. I cannot grant an eviction order under section 10(2).

[6] Should the applicant then rely on subsection 10(3),[16] it has not convinced me that it will be "seriously prejudiced" if the respondents are not evicted. Mr van As made the following statement on behalf of the applicant:

> "Die voortgesette okkupasie deur die Resondente van die woning van die Applikant maak ernstig inbreuk op die Applikant se bedrywighede en ekonomiese groei. Die Applikant maak gebruik van onafhanklike kontrakwerkers om die oeste in te bring. Die okkupasie deur die Respondente het tot gevolg dat die Applikant nie huisvesting kan bied aan die kontrakwerkers vir die tyd wat hulle op die plaas werksaam sal wees nie. Die Applikant se operasionele funksionering en ekonomiese groei word deur die Respondente se gedrag in die wiele gery."

This paragraph is word for word the same as a paragraph in the founding affidavit in the *Jacobs* case and similar to the wording of a paragraph in the founding affidavit in the *Noble* case. I am in full agreement with my colleague, Gildenhuys AJ where he remarked as follows on the above statement:

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16 Section 10(3)reads:

"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."

> "Die applikant het na my oordeel nie bewys dat sy onderneming ernstig benadeel sal word tensy die woning wat die respondente bewoon, beskikbaar is vir okkupasie deur 'n ander persoon wat in diens is van, of in diens geneem staan te word deur, die applikant nie. In die funderende eedsverklaring beweer Mnr van As dat die okkupasie van die woonhuis deur die respondente tot gevolg het dat die applikant nie huisvesting kan bied aan die kontrakwerkers wat van tyd tot tyd op die plaas werksaam sal wees nie, en dat dit die applikant se "operasionele funksionering en ekonomiese groei" in die wiele sal ry. Die stelling word nie verder toegelig of gemotiveer nie."[17]

Similarly, Gildenhuys AJ remarked in the *Noble* case:

> "Selfs al word die applikant se onderneming ernstig benadeel indien die woning nie aan hom beskikbaar gestel word nie, kan 'n uitsettingsbevel kragtens artikel 10(3) slegs verleen word indien dit regverdig en billik is om dit te doen, met inagneming van die pogings wat die applikant en die respondente onderskeidelik aangewend het om geskikte alternatiewe akkommodasie te bekom, en met verdere inagneming van die belange van die partye, met inbegrip van die vergelykende ontbering waaraan die applikant enersyds en die respondente andersyds blootgestel sal word indien 'n uitsettingsbevel verleen of nie verleen word nie. Die applikant handel glad nie met die pogings (indien enige) wat hy aangewend het om alternatiewe behuising vir die respondente te bekom nie. Hy tref ook geen vergelyking tussen die ontbering wat hy sal ly indien 'n uitsettingsbevel nie toegestaan word nie, en die ontbering wat die respondente sal ly indien 'n uitsettingsbevel wel toegestaan sal word."[18]

Similarly in this case before me, the applicant did not explain what efforts it has made to find alternative accommodation for the respondents as required by subsection 10(3)(i) of ESTA, neither did it compare the relative hardships it will suffer if the eviction order is not granted and those the respondents will experience if the order is indeed granted.[19] Section 10(3) has accordingly also not been complied with.

Notices in terms of section 9(2)(d)

[7] I am satisfied that the required notices in terms of section 9(2)(d) of ESTA were served in accordance to the prescribed procedure. These notices can, however, only be given once the right of

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17 At para [8].

18 At para [9].

19 See also in this regard *Kanhym (Pty) Ltd v Mashiloane* 1999 (2) SA 55 (LCC) where Dodson J stated at para [12]:

> " . . . It was necessary that the applicant set out details of the serious prejudice which one or more of its operations would suffer and to identify those operations. The enquiry is specific to that particular occupier (the respondent in this instance) and the particular house which he or she occupies. A causal connection must be shown between the unavailability of that particular dwelling and the serious prejudice which the owner's operation or operations will suffer. No such proof was offered by the applicant."

residence has been terminated.[20] As I have found that the respondents' rights of residence were not terminated, the service of the notices in terms of section 9(2)(d) is invalid.

Section 9(3) report

[8] Section 9(3) of ESTA makes it mandatory for the court to request a report within a reasonable period on various matters pertinent to an eviction, namely the availability of alternative accommodation, the constitutional rights of those affected and the undue hardship to the occupier occasioned by an eviction and any other matter as may be prescribed. [21] A report was received which recommended that the first respondent be reinstated in his employment with the applicant or that alternative accommodation in the Grabouw area be found for the respondents with the financial and other assistance of the applicant. Mr van As responded to the report and stated that the applicant is not in a position to accommodate the respondents as a result of its restructuring process. As stated in paragraph [5] above, it is unfortunate that the report did not address the possibility of any other accommodation. Nearly two years has expired since the retrenchment of the first respondent. Since then, he has been living rent-free on the applicant's land. I do think the first respondent must make a greater effort to obtain an alternative place to live than a mere statement that the municipality cannot help him.

Legal representation

[9] The first respondent stated in the magistrate's court "[e]k wil graag 'n prok. kry, maar die geld is so min." In *Nkuzi Development Association v The Government of the Republic of South Africa*,[22] it was held that occupiers are entitled to legal representation at the State's expense. If an

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20 See the wording of section 9(2)(d) quoted at n 6 above . See also *Die Landbou Navorsingsraad v Klaasen*, LCC 83R/01, 26 October 2001, Internet web site http://www.law.wits.ac.za/lcc/2001/83r01sum.html at para [18].

21 The Minister has yet to prescribe any other matters.

22 LCC 10/01, 6 July 2001, [2001] JOL 8500 (LCC), Internet web site http://www.law.wits.ac.za/lcc/2001/10-01sum.html. See also the discussion of this judgment by Mohamed "Right to representation reiterated" October 2001 *De Rebus* No 405 at 53. It was also discussed by Jazbhay in "Plight of the poor - security of

occupier is undefended, the court is under a duty to enquire why. Should it appear that there is no good reason for the lack of legal representation, this should be brought to the attention of the responsible organs of State.[23] I am of the opinion that in the event that a further application is brought for the eviction of the first respondent, the magistrate must make the necessary enquiries and, if necessary, bring the matter under the attention of the relevant organs of the State.

Order

[10] For the reasons set out above I am making the following order:

The eviction order granted by the Magistrate, Grabouw on 18 August 2001 in case number 33/2001 is set aside in whole.

ACTING JUDGE PRESIDENT F BAM

For the Applicant:
Miller Bosman Le Roux Attorneys, Somerset West.

For the Respondents:
In person.

tenure" November *De Rebus* No 406 at 55 and also by Jazbhay in "Occupier under Extension of Security of Tenure Act" in December 2001 *De Rebus* No 407 at 44-45.

23 The *Jacobs* case at para [19].