

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

**RANDBURG**

In chambers: **Gildenhuis AJ**

**CASE NUMBER: LCC 33R/01**

**MAGISTRATE'S COURT CASE NUMBER: 15/2001**

Decided on: 01 March 2001

In the review proceedings in the case between:

**BASEL, MR**

Plaintiff

and

**MKHIZE, P**

First Defendant

**MKHIZE, A**

Second Defendant

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## JUDGMENT

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**GILDENHUYS AJ:**

[1] This matter comes before me on automatic review from the Mooi River Magistrate's Court in terms of section 19(3) of the Extension of Security of Tenure Act.<sup>1</sup> I will refer to it as "the Tenure Act". The plaintiff is the owner of Fairview Farm, Kamberg, KwaZulu-Natal. I will refer to it as "the farm". The first defendant is an erstwhile employee of the plaintiff. According to the papers before me, his right of occupation arose solely from and was wholly dependent upon the continuation of the employment relationship with the plaintiff. The second defendant is the wife of the first defendant.

[2] The plaintiff alleged that the first defendant was dismissed from his employ on 19 April 2000 after the holding of a disciplinary hearing, for participating in an unprotected strike and refusing to work. According to the plaintiff, the first defendant referred his dismissal to the Commission for Conciliation,

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1 Act 62 of 1997, as amended.

Mediation and Arbitration although he did not do so timeously.<sup>2</sup> His application for condonation of the late filing of his referral was not granted.

[3] The plaintiff commenced his action in the magistrate's court by way of summons. In terms of the Tenure Act, the rules of procedure applicable in civil actions and applications in a High Court shall apply *mutatis mutandis* in respect of magistrate's court proceedings.<sup>3</sup>

[4] The defendants were given only five days within which to enter an appearance to defend. The High Court Rules require ten days.<sup>4</sup> I reiterate what was said by Meer AJ in *Swartz v Malope*:<sup>5</sup>

“I note that in contravention of section 17(4) of ESTA the summons complied with the magistrates' court rules of procedure instead of those for a High Court. The summons allows a five-day period for the defendant to enter an appearance to defend as opposed to the ten-day period provided for in rule 19(1) of the High Court Rules. The Court has criticised this practice on several occasions.”<sup>6</sup>

[5] The defendants did not enter an appearance to defend. The plaintiff applied for default judgment, using a form appropriate for default judgment in a High Court on a claim for a debt or a liquidated demand. The magistrate granted default judgment without receiving evidence, either *viva voce* or on affidavit. In the High Court, default judgment without hearing evidence may be granted by the registrar of the court if the claim is for a “debt or liquidated demand”.<sup>7</sup> In other cases, judgment must be applied for in open court and evidence must be submitted.<sup>8</sup>

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2 Section 191(1) of the Labour Relations Act, 65 of 1995 specifies that an employee has 30 days within which to refer a dispute about the fairness of a dismissal to the Commission.

3 Section 17(4).

4 Rule 19(1) of the Uniform Rules of the High Court (the Uniform Rules).

5 LCC 83R/00, 26 October 2000, [2000] JOL 7623 (LCC), internet web site <http://www.law.wits.ac.za/lcc/2000/83r00sum.html>.

6 Above n 5 at para [11].

7 Rule 31(5) of the Uniform Rules.

8 Rule 31(2)(a) of the Uniform Rules.

[6] According to Erasmus<sup>9</sup>

“The term ‘debt or liquidated demand’ can be equated with a claim for a fixed, certain or ascertained amount or thing, and includes a liquidated claim as known at common law.”<sup>10</sup>

A claim is liquidated if it is capable of being speedily and promptly ascertained.<sup>11</sup> This could include a common law ejectment claim.<sup>12</sup>

[7] An eviction claim under the Tenure Act is not capable of speedy or prompt determination. The Tenure Act is social legislation, designed to address societal problems. It requires the court to make value judgments, and to exercise judicial discretion. I will refer to some examples:

- Under section 8(1) of the Tenure Act, the court must determine whether the termination of an occupier’s right of residence was just and equitable, having regard to all relevant factors, some of which have been enumerated;
- If the plaintiff relies on one of the subsections of section 10(1) of the Tenure Act, the court will have to decide issues to which there may not be a ready answer, for example, whether 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;<sup>13</sup>
- If the plaintiff relies on section 10(2) of the Tenure Act, the court will have to determine whether any alternative accommodation alleged to be suitable and to be available to the occupier, is indeed suitable and available;

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9 Erasmus, *Superior Court Practice* (Juta, Cape Town 1999).

10 Above n 9 at B1-198 (Service issue 7).

11 *Fatti’s Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 739A-G

12 In the absence of any defence by a person residing on land, it is possible, at common law, for a land owner to obtain the eviction of that person merely by proving ownership of the land concerned. For examples see *Morris v Stern* 1970 (1) SA 246 (R); *Brooks and another v Martin Brothers Plumbing Co (Pvt) Ltd* 1974 (2) SA 39 (R).

13 Section 10(1)(c) of the Tenure Act.

- If the plaintiff relies on section 10(3) or section 11 of the Tenure Act, the court must determine whether it will be just and equitable to grant an eviction order;
- The court must determine a just and equitable date on which the occupier shall vacate the land,<sup>14</sup> and in doing so it must have regard to all relevant factors, including a number of factors listed in the Tenure Act;<sup>15</sup>
- The court must inquire into and order the owner or person in charge to pay compensation for structures erected, improvements made or crops planted by an occupier, to the extent that it is just and equitable to do so;<sup>16</sup>
- The court must inquire whether outstanding wages or related amounts are due to an occupier, and order the owner or person in charge to pay the same.<sup>17</sup>

A claim for eviction under the Tenure Act is, in my view, not a liquidated demand, and default judgment must not be given in the absence of supporting evidence.

[8] The nature and extent of the supporting evidence will depend significantly on the perspicacity of the judicial officer concerned in relation to the facts of each particular case. Where the court has to exercise a discretion or make a value judgment, there must be evidence on which that discretion or value judgment can be based. The evidence need not necessarily be *viva voce*. In most instances, affidavits will suffice.<sup>18</sup>

[9] My conclusion accords with section 26(3) of the Constitution,<sup>19</sup> which reads:

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14 Section 12(1)(a) of the Tenure Act.

15 Section 12(2) of the Tenure Act.

16 Section 13(1)(a) of the Tenure Act.

17 Section 13(1)(b) of the Tenure Act.

18 See *Havenga v Parker* 1993 (3) SA 724 (T).

19 The Constitution of the Republic of South Africa, Act 108 of 1996.

“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.” (My underlining).

Moloto AJ came to the same conclusion in *Gartmore Farm (Pty) Ltd v Ndlovu and Others*,<sup>20</sup> where he stated:

“Having taken all of the above into account I come to the conclusion that an application for default judgment, in ESTA cases, must be dealt with in terms of rule 31(2)(a) as if a claim for ejection is not a liquidated demand.”<sup>21</sup>

[10] Apart from the fact that default judgment was given in this case without any evidence in support thereof, there are also other shortcomings in the papers which should have precluded an eviction order. I will deal with them hereunder. I have not attempted to give a comprehensive list.

[11] Under section 9(2)(c) of the Tenure Act, the conditions for an eviction order in terms of section 10 or section 11 must have been complied with. Section 10 applies to a person who was already an occupier on 4 February 1997, while section 11 applies to a person who only became an occupier after 4 February 1997. No facts are given in the plaintiff’s particulars of claim to establish which of sections 10 or 11 is applicable and on what circumstances the plaintiff relies to constitute compliance with the applicable subsection of section 10 or 11. The plaintiff’s particulars of claim contain the following statement:

“The Plaintiff has followed the procedure prescribed in terms of section 10 of the said Act in that it served a Section 9[2][d][i] notice on the First and Second Defendant . . .”

This is incorrect because section 10 does not prescribe any procedures relating to section 9(2)(d) notices.

[12] There is no proof in the annexures to the plaintiff’s particulars of claims that a notice in terms of section 9(2)(d)(ii) was served on the municipality in whose area of jurisdiction the farm is situated.

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20 [2000] 4 All SA 422 (LCC).

21 Above n 20 at para [10].

[13] Section 9(3) of the Tenure Act requires that, for purposes of section 9(2)(c), the court must request a probation officer or an officer of the Department of Land Affairs 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.”

There is no indication that such a report was requested. Although a report might be unnecessary in certain circumstances,<sup>22</sup> it was not shown, in this case, that circumstances exist which could make it unnecessary.

[14] The magistrate should have inquired whether the defendants are entitled to compensation for structures erected or improvements made by them, or for standing crops planted by them.<sup>23</sup> The magistrate should also have inquired whether he must order the owner or person in charge to pay any outstanding wages or related amounts which might be due to the first defendant.<sup>24</sup> The court is obliged under the Tenure Act to make orders in respect of these issues, when applicable, and must therefore inquire into them.<sup>25</sup>

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22 See *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another* [2000] 3 All SA 279 (LCC) and compare therewith the contrary conclusions reached in *Valley Packers Co-Operative Limited v Dietloff and Another* LCC 84R/00, 12 December 2000, [2001] JOL 7828 (LCC); internet web site <http://www.law.wits.ac.za/lcc/2000/84r00sum.html> and *Glen Elgin Trust v Titus and Another* LCC 81R/00, 27 December 2000, [2001] JOL 7851 (LCC), internet web site <http://www.law.wits.ac.za/lcc/2000/81r00sum.html>.

23 Section 13(1) of the Tenure Act.

24 Section 13(2) of the Tenure Act.

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

[15] The magistrate did not make it clear in his order that the eviction order is suspended pending the review by this Court.<sup>26</sup> Meer J in *Glover and Others v Sethoua and Another*<sup>27</sup> stated:

“I notice that the magistrate did not make it clear that an eviction order shall be suspended pending the review thereof by this Court. It would be prudent to make this clear in the eviction order. Failure to state that the eviction order is suspended could lead to it being implemented in ignorance of the suspension, which must be avoided at all cost.”<sup>28</sup>

[16] For the reasons stated above, and in terms of section 19(3)(b) of the Tenure Act, the eviction order given by the Magistrate, Mooi River on 6 February 2001 is hereby set aside in full.

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**ACTING JUDGE A GILDENHUYS**

For the plaintiff:

*Mr M Kennard* instructed by *Austen Smith, Pietermaritzburg*.

For the defendants:

*No appearance.*

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26 Section 19(5) of the Tenure Act.

27 LCC 54R/00, 4 August 2000, [2000] JOL 7294 (LCC), internet web site <http://www.law.wits.ac.za/lcc/2000/54r00sum.html>.

28 Above n 27 at para [6].