

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **Gildenhuis AJ**

CASE NUMBER: LCC 02R/02

MAGISTRATE'S COURT CASE NUMBER: 6276/2001

Decided on: 22 January 2002

In the review proceedings in the case between:

BOWER, D M

Applicant

and

NKOMUZWAYO, G V

Respondent

JUDGMENT

GILDENHUYS AJ:

[1] This is a review in terms of section 19(3) of the Extension of Security of Tenure Act¹ (hereinafter referred to as the "Tenure Act") of an eviction order made by a magistrate in the Newcastle Magistrate's Court. No appearance to defend having been entered, the order was granted by default after an assurance was given by the applicant's attorney that the provisions of the Tenure Act had been complied with. As will appear from this judgment, that assurance was incorrect and should not have been given. A probation officer's report was furnished in terms of section 9(3) of the Tenure Act.

[2] The applicant is the owner of a subdivision called "Erfstuk" of the farm Schuinshoogte in the district of Newcastle. According to the founding affidavit, the applicant met the respondent "approximately ten years ago" when the respondent came to the farm. The applicant employed him to work on the farm shortly thereafter. Approximately one year after having been employed on the farm, the respondent brought a woman and child to live with him on the farm. The applicant then permitted

1 Act 62 of 1997, as amended.

him to build a dwelling on the farm. It is stated in the founding affidavit that “some years ago” the applicant terminated respondent’s employment as a result of a drinking problem. The respondent then left the farm and took up employment with another farmer in the district. He was away for approximately one year. Thereafter the applicant re-employed the respondent on the farm, in the belief that he would improve his behaviour. The date of re-employment is not given. During the period 13-27 September 1999 the respondent allegedly absconded from work, and the applicant terminated his services on 27 September 1999.

[3] The applicant alleged that the respondent’s right to occupy the farm arose solely from his employment agreement, and that his right to occupy was also terminated on 27 September 1999. No details of the termination were given. Despite the purported termination of his right of residence, the respondent remains in occupation of the farm. According to the applicant, he now works on a temporary basis for other farmers in the area.

[4] After notices in terms of section 9(2)(d) of the applicant’s intention to obtain an eviction order were given to the respondent,² the municipality and the Department of Land Affairs, proceedings in the magistrate’s court were commenced on 14 November 2001 by service of a notice of motion on the respondent. The probation officer’s report was received on 18 December 2001 and an eviction order was granted on 20 December 2001.

[5] The probation officer’s report contains pertinent information which should have been included in the applicant’s founding affidavit. I will deal with that later in this judgment. Some of the allegations contained in the report conflict with the contents of the founding affidavit.³ Unfortunately, the probation officer did not indicate with whom he conducted interviews for purposes of his report. He ought to have spoken to both parties.⁴ In the matter of *Magodi and Others v Janse van Rensburg*⁵ I stated that it

2 The notice given to the respondent was defective, as will appear from para [10] of this judgment.

3 For example, according to the probation officer’s report the respondent was first employed on the farm during 1980, and not “approximately ten years ago”, as alleged by the applicant.

4 See *Glen Elgin Trust v Titus and Another* [2001] 2 All SA 86 (LCC) at para [4]; *Terblanche NO v Flippies and Others*, LCC 36R/01, 25 May 2001, Internet web site address

would be good practice for a court to give litigants an opportunity to respond to reports filed by probation officers, should they wish to do so. Such responses should, in the case of motion proceedings, take the form of supplementary affidavits.⁶ No supplementary affidavits were filed in response to the probation officer's report in this matter.

[6] The requirements for an eviction order are contained in section 9(2) of the Tenure Act. It reads 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, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based . . .”

[7] The founding affidavit contains cryptic allegations which are barely sufficient to comply with sections 9(2)(a) and (b) of the Tenure Act. It would have been helpful if more details of the termination of the respondent's right of residence and the notice given to him to vacate the land, were given.

<http://www.law.wits.ac.za/lcc/2001/36r01sum.html> at para [7] and *Theewaterskloof Holdings (Pty) Ltd, Glaser Division v Noble and Another*, LCC 92R/01, 19 October 2001, Internet web site address <http://www.law.wits.ac.za/lcc/2001/92r01sum.html> at para [14].

5 LCC 29R/01, 29 November 2001, Internet web site <http://www.law.wits.ac.za/lcc/2001/29r01sum1.html>.

6 See para [7] of the *Magodi* case.

[8] In terms of section 9(2)(c) of the Tenure Act, the requirements for an order for eviction contained in section 10 or 11 must be complied with. Section 10 applies to a person who was an occupier on 4 February 1997, and section 11 applies to a person who became an occupier after 4 February 1997. The applicant did not deal with the requirements of these sections in his founding affidavit. Because it is not stated on which date the respondent was re-employed on the farm, it is not clear whether section 10 or 11 applies.⁷ The failure to indicate on which subsection of section 10 or 11 the applicant relies, and the absence of the requisite information to establish that the requirements of the applicable subsection have been met, makes the application fatally defective.

[9] The applicant alleged that he purchased a stand for the respondent in the Madadeni area. In that respect, the founding affidavit contains the following allegations:

- “5.3 The purchase of the stand was relatively easy and Respondent had a choice of many stands before he finally settled on the stand which I purchased for him.
- 5.4 The stand purchased for Respondent is safe and overall not less favourable than his current situation, save that he will be required to rebuild his shack on the stand.
- 5.5 The stand purchased for Respondent is nearer to the Newcastle Central Business District than his current lodgings and has access to running tap water at the stand, a luxury which he does not currently have.”

The probation officer reported as follows on that stand:

“The owner provided the occupier with one place in Mountain and the area is called eManzana, which the occupier did not like since it was like the township.”

The applicant may be of the opinion that the provision of the stand constitutes “suitable alternative accommodation” and that the provision of such accommodation is sufficient compliance with section 9(2)(c). Such an opinion would not be correct. Suitable alternative accommodation is defined in section 1 of the Tenure Act as follows:

⁷ See two sections differ substantially. See *Lategan v Koopman and Others* 1998 (3) SA 457 (LCC), [1998] 3 All SA 603 (LCC) at para [7].

“alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to-

- (a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
- (b) their joint earning abilities; and
- (c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active.”

The mere fact that the stand in Madadeni is vacant puts it outside the requirements of the definition. It could, however, be turned into “suitable alternative accommodation” if the existing dwelling on the farm is broken down and re-assembled on the stand. That would require effort and money, which someone would have to provide. The provision of the stand is, nonetheless, a consideration which must carry some weight when the equities of an eviction order are considered.

[10] There is no indication that the requirements of section 9(2)(d)(i) relating to service on the occupier of the notice of intention to obtain an eviction order, have been met. Paragraphs 9(2) and (3) of the regulations made in terms of the Tenure Act read 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
 - (b) by reading the portion equivalent to the said 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 conforms substantially to Form E in the Annexure.
- (3) Where necessary, an interpreter must be used for reading the highlighted part of a copy of a notice contemplated in subregulation (1) or (2).”

The notice of intention to obtain an eviction order was given in English. There is no copy of the notice in another official language amongst the papers before me,⁸ and there is no indication that the sheriff complied with the prescribed service requirements. According to the return of service, the service was effected “in accordance with rule 9(3)(b) and (c)”. The reference obviously relates to the Magistrates’ Courts rules, which do not apply.⁹

[11] The court must consider section 13(1) of the Tenure Act when making an eviction order. This section reads as follows:

- “(1) If a court makes an order for eviction in terms of this Act-
- (a) the court shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors, including whether-
 - (i) the improvements were made or the crops planted with the consent of the owner or person in charge;
 - (ii) the improvements were necessary or useful to the occupier; and
 - (iii) . . .
 - (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); . . .”

There is no indication that section 13(1) was considered by the Magistrate. The papers filed by the applicant do not contain sufficient information to enable the Magistrate to give proper consideration to the requirements of the subsection. Such information must be given to the court.¹⁰ In this instance, it is particularly regrettable that the information was not given, because it appears from the report of the probation officer that the respondent built his dwelling on the farm himself. The applicant provided only

8 The notice of motion, when served, was served in English and Zulu and explained to the respondent. Unfortunately, there is no evidence that the same was done with the notice to obtain an eviction order.

9 Regulations under the Tenure Act have their own service requirements. In terms of section 17(4) of the Tenure Act, the High Court rules apply to litigation under the Tenure Act, not the Magistrates’ Court rules.

10 See *Howarth v Schoeman and Another* [2001] 4 All SA 405 (LCC) at para [11] and *Pitout v Mbolane* [2000] 2 All SA 377 (LCC) at para [15].

“a few corrugated irons”. Furthermore, it is stated that the respondent has a small vegetable garden, approximately the size of a soccer field, and land for maize planting “inside the yard”. It is also stated in the report that when the respondent asked for his blue card and pension monies, he did not get anything.

[12] There are some further aspects of this case which cause concern. The first emanates from the probation officer’s report. The Tenure Act has been promulgated to address social problems. Reports by probation officers are given to assist the court in dealing with such problems. When a probation officer raises potential problems, the court has a duty to enquire into the problems or to ask the parties to deal with them. As would appear from this judgment, the probation officer’s report did not get the attention it deserved.

[13] Another aspect of concern relates to legal representation for the respondent. It was held in the case of *Nkuzi Development Association v The Government of the Republic of South Africa and Another*¹¹ that persons who have a right to security of tenure and whose security of tenure is threatened or has been infringed, are entitled to legal representation or legal aid at state expense in cases where substantial injustice would otherwise result, and if they cannot reasonably afford the costs of such representation from their own resources. In the case of *Theewaterskloof Holdings (Pty) Ltd, Glaser Division v Jacobs and Others*¹² it was held as follows:

“Dit sal raadsaam wees indien landdroste, waar okkupeerders nie regsverteenwoordiging in uitsettingsaansoeke kragtens die Verblyfregwet het nie, navraag sal doen waarom daar nie regsverteenwoordiging is nie. Indien die landdros van oordeel is dat regsverteenwoordiging moontlik sonder goeie rede aan ‘n okkupeerder deur ‘n toepaslike staatsinstelling weerhou was, behoort hy ‘n toepaslike uitstel te verleen en die saak onder die aandag van die Departement van Justisie en die Departement van Grondsake te bring.”¹³

11 [2001] 4 All SA 460 (LCC) at para [12].

12 LCC 91R/01, 19 October 2001, Internet web site <http://www.law.wits.ac.za/lcc/2001/91r01sum.html> at para [19]. The same was said in the case of *Theewaterskloof Holdings v Noble*, above n 4, at para [11].

13 At para [19] of the said judgment.

The probation officer reported that the respondent was represented by Mr Mxolisi Zulu of the Campus Law Clinic of the University of Natal. His telephone number was given in the report. Enquiries should have been directed to Mr Zulu as to whether he still represented the respondent, and why no appearance to defend was entered.

[14] The last cause for concern relates to the people living with the respondent on the farm. According to the probation officer's report, such persons include his wife, two children above 18 years old and five children below 18 years old. This information is essential to enable the court to exercise the various discretions given to it under the Tenure Act.¹⁴ It is regrettable that the applicant did not furnish such information to the court. Although persons who reside on land through or under an occupier who has a right of occupation under the Tenure Act, may not be occupiers in their own right and need not be cited in eviction proceedings,¹⁵ information on their presence is essential and must be provided to the court. In this case I regard that omission as particularly serious, because of the following allegation contained in the probation officer's report:

“Mr Nkomuzwayo [**the respondent**] was providing labour since 1980 and was paid only R50 a month. Also his wife was working for the owner and was paid R60 a month. His daughter was casual and was paid R60 week.”

The employment contracts of the respondent's wife and possibly also of the respondent's daughter, might well include the right to live on the farm.¹⁶ That would make them occupiers in their own right.¹⁷ If they are occupiers in their own right, their right to reside on the farm will not be dependent on the respondent's right. If that is the case, it should be made clear that any eviction order against the respondent will not affect their right of residence. This aspect of the case should have been further investigated before the Magistrate made her eviction order.

14 For example, the interests of such persons are pertinent for decisions under sections 10(3)(ii), 11(3)(e) and 12(2)(b) of the Tenure Act.

15 *Die Landbou Navorsingsraad v Klaasen*, LCC 83R/01, 29 October 2001, Internet web site address <http://www.law.wits.ac.za/lcc/2001/83r01sum.html>.

16 The respondent's wife originally came to the farm to live with him. Her status might have changed after she took up employment on the farm.

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

[15] The eviction order made by the Magistrate clearly cannot stand. Because the applicant might overcome the difficulties I have raised, by delivering supplementary affidavits and information, he should be given an opportunity to do so.

[16] The order made by the Magistrate, Newcastle, on 20 December 2001 is hereby set aside and substituted by the following order:

- (a) The applicant's application is dismissed;
- (b) The applicant is given leave to renew the application, on the same papers and supplemented as he may be advised, by no later than 28 February 2002; and
- (c) No order is made as to costs.

ACTING JUDGE A GILDENHUYS

For the applicant:

Du Toit-Peens-Steinhobel Incorporated, Newcastle.

For the respondent:

Absent.