

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

**RANDBURG**

In chambers: **Gildenhuis AJ**

**CASE NUMBER: LCC 108R/01**

**MAGISTRATE'S COURT CASE NUMBER: 62/2001**

Decided on: 23 January 2002

In the review proceedings in the case between:

**JOAN MARY REEVES**

Plaintiff

and

**ISAAC SHEMU NENE**

First Defendant

**ROSE WINNIE NENE**

Second Defendant

**LINDIWE NENE**

Third Defendant

**SIFISO NICHOLAS NENE**

Fourth Defendant

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## JUDGMENT

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**GILDENHUYS AJ:**

[1] This is an automatic review in terms of section 19(3) of the Extension of Security of Tenure Act<sup>1</sup> (hereinafter referred to as the "Tenure Act") of an eviction order made by a Magistrate in the Colenso Magistrate's Court, district Estcourt on 4 December 2001.

[2] The plaintiff is the owner of the farm Morningside, Winterton, KwaZulu-Natal. The first defendant is an erstwhile employee of the plaintiff on the farm. His employment was terminated during February 2001 when he was dismissed after a disciplinary hearing. The other three defendants are members of his family. All the defendants reside on the farm, and continued to reside there after the first defendant's dismissal.

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1 Act 62 of 1997, as amended.

[3] The plaintiff issued summons for the eviction of the defendants. No appearance to defend was entered, and the eviction order was granted by default. The summons is defective, in that it allows only five days for the entry of an appearance to defend. The High Court rules are applicable to proceedings in magistrates' courts under the Tenure Act,<sup>2</sup> and the High Court rules require *dies induciae* of ten days.<sup>3</sup> A default judgment given pursuant to a summons allowing insufficient *dies induciae* cannot stand.<sup>4</sup>

[4] The default judgment is all the more regrettable because the defendants were, to the knowledge of the plaintiff, legally represented. This should have been communicated to the magistrate, and enquiries should have been made why the attorney did not enter an appearance to defend. It may well be the result of the insufficient *dies induciae*. It was held in the case of *Nkuzi Development Association v The Government of the Republic of South Africa and Another*<sup>5</sup> that an occupier in terms of the Tenure Act whose security of tenure is threatened or has been infringed, is entitled to legal representation. In the case of *Theewaterskloof Holdings (Pty) Ltd, Glaser Division v Jacobs and Others*<sup>6</sup> it was stated:

“Dit sal raadsaam wees indien landdroste, waar okkupeerders nie regsverteenvoordinging in uitsettingsaansoeke kragtens die Verblyfregwet het nie, navraag sal doen waarom daar nie regsverteenvoordinging is nie.”

[5] Apart from the fact that the summons was fatally defective, the evidence given does not support an eviction order. The requirements for an eviction order are contained in section 9(2) of the Tenure Act. The section reads as follows:

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2 Section 17(4) of the Tenure Act.

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

4 Van Winsen et al *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa*, Dendy (ed), 4th ed (Juta, Cape Town 1997) at 283.

5 [2001] 4 All SA 460 (LCC) at para [12].

6 LCC 91R/01, 19 October 2001, Internet web site <http://www.law.wits.ac.za/lcc/2001/91r01sum.html> at para [19].

“(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 . . .”

[6] There is no evidence that the first defendant’s right of residence has been terminated (as required in terms of section 9(2)(a) of the Tenure Act) or that the first defendant was called upon to vacate the land within a period of notice given by the owner (as required in terms of section 9(2)(b) of the Tenure Act). On 26 February 2001, when the first defendant’s employment was terminated, the plaintiff’s attorney wrote to the first defendant as follows:

“Notice will be delivered to you and all members of your family in the very near future by the Sheriff requiring you to vacate the dwelling in which you are currently living. If you do not do so within the period stipulated in the notice to be served on you, action towards your eviction will be taken.

Please ensure that all rentals due in terms of your employment agreement are paid to our client timeously at the commencement of each month.”

The demand for rental seems to indicate that there may be a lease agreement in force, which was not cancelled. If the right of residence derives from the employment agreement and the employment agreement was cancelled, it is not clear why the first defendant is called upon to pay rental in terms of the employment agreement. The first defendant was also informed that a notice to vacate will be given some time in the future. Apart from the section 9(2)(d) notice, there is no evidence of any other notice

to vacate given to first defendant, as required under section 9(2)(b). A section 9(2)(b) notice is discrete from a section 9(2)(d) notice.<sup>7</sup> None of these notices can be given before the right of residence has been terminated.

[7] In relation to section 9(2)(c) of the Tenure Act, the plaintiff did not indicate which of section 10 or 11 is applicable. The facts indicate that it is section 10. The plaintiff furthermore does not indicate on which subsection of section 10 she relies. It appears from the record of the disciplinary enquiry that there might be grounds for a conclusion that the first defendant has committed such a fundamental breach of the relationship between him and the plaintiff,<sup>8</sup> that it is not practically possible to remedy it. Such a conclusion might have supported an eviction order under section 10(1)(c) of the Tenure Act, but the necessary allegations were not made,<sup>9</sup> neither in the particulars of claim nor in the plaintiff's evidence in court on 20 November 2001.

[8] Lastly, there is no proof of compliance with sections 9(2)(d)(ii) and (iii) of the Tenure Act, which requires notices of intention to obtain an eviction order to be given to the municipality and the provincial office of the Department of Land Affairs. The notices annexed to the summons are dated 18 October 2001, one day later than the date on the plaintiff's particulars of claim. The plaintiff testified that the notices were dispatched by registered post, but the post office registration slips annexed as proof thereof indicate the dispatch date as 13 June 2001, long before the date on the notices. The discrepancy was not explained.

[9] At the hearing the plaintiff's attorney asked (according to the magistrate's notes) for "judgment to be granted for eviction the execution be withheld until 1/1/2002 with costs". The Magistrate noted, on 4 December 2001: "Order granted as prayed". In so doing, the Magistrate failed to comply with section 12(1) of the Tenure Act, which requires that orders for the eviction of an occupier must contain

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7 *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> at para [18].

8 As envisaged in section 10(1)(c) of the Tenure Act.

9 The evidence given at the disciplinary enquiry is not *ipso facto* evidence in this case.

a just an equitable date on which the occupier shall vacate the land, and must also contain a date on which the eviction order may be carried out, if the occupier has not vacated the land.

[10] There is no indication that the magistrate gave any attention to the matters to be considered under section 13(1) of the Tenure Act. In cases where section 13(1) is applicable, it is mandatory for the court to make an appropriate order.

[11] Furthermore, there is neither a probation officer's report, nor a written request for such a report, as required under section 9(3) of the Tenure Act, contained in the record before me. The absence of such a report is not explained.

[12] It follows that the eviction order cannot stand. In terms of section 19(3) of the Tenure Act, it is hereby set aside and substituted by an order as follows:

- (a) The application for default judgment is dismissed; and
- (b) No order is made as to costs.

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**ACTING JUDGE A GILDENHUYS**

For the plaintiff:

*Christopher, Walton & Tatham Attorneys, Ladysmith, KwaZulu-Natal.*

For the defendants:

*Absent.*