

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NUMBER: LCC43R/03

In chambers: **Moloto J**

MAGISTRATE'S COURT CASE NUMBERS: 110/03 - 127/03

Decided on: 11 June 2003

In the matter between:

VITA FRESH FARM

Plaintiff

and

WANDERBOY NGUBANE AND 17 OTHER CASES

Defendants

JUDGMENT

MOLOTO J:

[1] The plaintiff issued eighteen summonses against eighteen defendants in the Magistrate's Court, Camperdown. The cause of action and the grounds on which it is based are common in all eighteen cases. The plaintiff sought an order for eviction and costs against the defendants in terms of the Extension of Security of Tenure Act¹ ("the Act"). The magistrate granted the order for eviction with costs in default of appearance on 19 May 2003 in case 110/03 and on 21 May 2003 in the rest of the cases. The cases have been referred to this Court on automatic review in terms of section 19(3) of the Act. This review judgment relates to all eighteen cases.

[2] The defendants were employed by the plaintiff at various times as labourers on the plaintiff's farm known as Vita Fresh Farm ("the farm"), Umlaas Road, KwaZulu-Natal. According to the particulars of claim, the following are the allegations against the defendants:

- (a) they resided in a compound on the farm;
- (b) their right of residence arose solely from their employment with the plaintiff;

1 Act of 62 of 1997, as amended.

- (c) they are occupiers as defined in the Act;
- (d) on the 30 November 2001 their employment was terminated with effect from 21 December 2001 following their retrenchment;
- (e) they were each paid severance pay and leave pay according to how much leave each was entitled to;
- and
- (f) they were given notice to vacate the farm on or before 19 May 2002.
- (g) the defendants have not vacated the farm.

[3] The requirements for an order of eviction are set out in section 9(2) of the Act. It reads:

- “(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: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with”.

I am satisfied that the provisions of section 9(2)(a), (b) and (d) have been complied with. Section 9(2)(c) requires that people who were occupiers on 4 February 1997 be dealt with in terms of section 10 and those who became occupiers after 4 February 1997 in terms of section 11.

[4] The plaintiff relied on section 10(1)(d), alternatively 10(3) for those defendants who were occupiers on 4 February 1997, and on section 11(1), alternatively 11(3) for those who became occupiers after 4 February 1997. Section 10(1)(d) is clearly not applicable as the defendants did not voluntarily resign. As regards sections 10(3) and 11(3) there is no evidence which could enable the court to determine whether an eviction order was just and equitable with regard to efforts by the parties to find suitable alternative accommodation and the interests of the

respective parties. Moreover, section 11(3) is not a separate ground of eviction but serves as a guide in considering a ground of eviction either under section 11(1) or 11(2). In the result, the only defendants who might have been correctly evicted are those who were evicted in terms of section 11(1), provided that that subsection was read with section 11(3). The defendants evicted under section 11(1) cannot be said to have been properly evicted as the provisions of section 11(3) could not have been taken into consideration in determining whether their eviction was just and equitable under section 11(1). The necessary evidence was not placed before the Court for the above reasons the eviction orders in all the cases stand to be set aside.

[5] The order of the magistrate stands to be set aside for other reasons as well.

There are other issues that I wish to comment on. They are :

(a) No evidence:

There was no evidence led in the cases. An eviction under the Act is not a liquidated claim.² It is also not like an eviction under the common law where the plaintiff merely alleged that he is the owner and the defendant is in occupation. Under the Act there are many issues to be proved and these should be proved by affidavit or by *viva voce* evidence, *In casu* the proceedings are on summonses. The problems discussed above regarding reliance on various subsections of sections 10 and 11 and the necessity of providing sufficient information to enable the court to exercise the requisite disquisitions, illustrate the importance of leading evidence in eviction cases under the Act.

(b) Probation officer's report:

Section 9(3) of the Act requires that, for purposes of a determination in terms of section 10(3) and section 11, as the plaintiff prayed, a report by a probation officer must be sought. The report must deal with the following issues:

2 *Gartmore Farm (Pty) Ltd v Ndlovu & Others* [2000] 4 All SA 422 (LCC) at para [6]-[10]; *Basel v Mkhize & Another* LCC 33R/01, 01 March 2001, available from www.law.wits.ac.za at para [5]-[7]; *Friend v Masimula* LCC 103R/02, 06 December 2002, available from www.law.wits.ac.za at para [10].

- (a) the availability of suitable alternative accommodation to the occupier;
- (b) the effect of the eviction on the constitutional rights of any affected person, including the rights of children, if any, to education;
- (c) any undue hardships which an eviction would cause the occupier; and
- (d) any other matter as may be prescribed.

There is no evidence from the record of any of the cases that such a report had been sought. There could not have been a proper consideration of sections 10(3) and 11 without such a report. This further confirms the irregularity of any determination the magistrate may have made in terms of those sections.

(c) Section 12:

Section 12 of the Act provides that when granting an eviction order, a court shall determine a just and equitable date on which the occupier must vacate the plaintiff's property, and a just and equitable date on which the eviction order may be carried out if the occupier fails to vacate on the first-mentioned date. No determination of such dates was made by the court.

(d) Section 13:

Section 13 provides for payment to the occupier of compensation for structures erected, improvements made and any standing crops planted by the occupier, as well as payment of any outstanding wages and related amounts. It is alleged that the defendants lived in a compound, presumably built by the plaintiff. There would then be no need for compensation for structures erected or improvements made. It is also alleged that outstanding wages and related amounts were paid to the defendants. However, there is no determination made with regard to standing crops. There is no allegation made in this regard, either. The provisions of section 13 are peremptory. It is irregular for a court not to investigate the need for making such an order.

(e) Costs:

Notwithstanding the plaintiff's concession that it is inappropriate to ask for a costs order in the circumstances of these cases the magistrate granted a costs order against the defendants. This Court has mentioned in several cases³ that social legislation is involved in these cases and that unless exceptional circumstances prevail, costs are not awarded. Costs should not have been awarded.

[6] The following order is made:

The orders of the Magistrate, Camperdown made on 19 May 2003 and 21 May 2003 in cases 110/03, 111/03, 112/03, 113/03, 114/03, 115/03, 116/03, 117/03, 118/03, 119/03, 120/03, 121/03, 122/03, 123/03, 124/03, 125/03, 126/03 and 127/03 are hereby set aside in whole and the following order is substituted in each of the said cases:

“The action is dismissed. No order as to costs is made”.

JUDGE J MOLOTO

For the plaintiff:
Walther & Ender Attorneys, Camperdown

For the respondent:
Absent.

3 See, for example, *Serole and Another v Pienaar* 2000 (1) SA 328 (LCC); [1999] 1 All SA 562 (LCC) at para [19]; *Skhosana and Others v Roos T/A Roos se Oord* 2000 (4) SA 561 (LCC); [1999] 2 All SA 652 (LCC) at para [30].