IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 17 March 1999 **CASE NUMBER**: LCC4/99
before **Meer** and **Dodson JJ**

In the case between:

LESTER PAUL HEN-BOISEN NO First Appellant
LISA HEN-BOISEN NO Second Appellant

and

DAVID LOLIWE Respondent

JUDGMENT

MEER J:

[1] This is an appeal against the whole of the judgment of the magistrate for Port Alfred delivered on 25 August 1998, in the magistrate's court for the district of Bathurst held at Port Alfred. The judgment upheld with costs the defendant's (respondent herein) special plea that he is an occupier of plaintiff's land in terms of the Extension of Security of Tenure Act, Act No 62 of 1997 (hereinafter the "Tenure Act").

[2] The facts upon which the matter must be decided are common cause. The appellants are the trustees of the L P Hen-Boisen Family Trust. In their capacities as trustees, they are the registered owners of Farms No 144, 143 and Remainder of the Farm No 139, Division of Bathurst, Province of the Eastern Cape (hereinafter referred to as "the land"). Respondent has been living on the land with his family for some years. He had the consent of the previous owner, Mr van der Merwe, to live there. The consent was, however, lawfully withdrawn early in 1995, before the farm was sold to the appellants. Respondent did not move and when the appellants purchased the land on 20 September 1995, he was living there. At no stage after the appellants became owners of the land did they give

respondent consent to continue residing on the farm. Respondent still resides there and has done so continuously since the consent of the former owner was withdrawn.

[3] On 10 September 1997, appellants issued a summons for the eviction of respondent and his family from the land. Respondent (defendant in the court a quo) pleaded thereto by way of a special plea as follows:

> "DEFENDANT'S SPECIAL PLEA
> The Defendant is an occupier of Plaintiff's land in terms of the Extension of Security of Tenure Act, Act 62 of 1997.
> In terms of the aforesaid Act this Honourable Court may only grant an order of eviction against the defendant if Plaintiff has complied with certain provisions of the Act, namely Section 9(2), 10(2) and 13(3), which he has failed to do.
> Wherefore Defendant prays that plaintiff's claim is dismissed with costs.
> . . . ."

[4] Respondent in the court a quo argued that he was an occupier by virtue of the provisions of section 3(2)(a) of the Tenure Act which states:

> "(2) If a person who resided on or used land on 4 February 1997 previously did so with consent, and such consent was lawfully withdrawn prior to that date -
>
> (a) that person shall be deemed to be an occupier, provided that he or she has resided continuously on that land since consent was withdrawn; and
>
> (b) the withdrawal of consent shall be deemed to be a valid termination of the right of residence in terms of section 8, provided that it was just and equitable, having regard to the provisions of section 8."

It was common cause, respondent's argument went, that he was residing on the land on 4 February 1997, that he previously did so with consent, that such consent was lawfully withdrawn prior to 4 February 1997 and that he had since resided there continuously. Accordingly, he argued, he is deemed to be an occupier under section 3(2)(a).

[5] The appellants by contrast argued that the Act did not apply and the eviction was one under common law. They refuted respondent's argument that he was an occupier by virtue of the deeming provision in section 3(2)(a), with the submission that the consent referred to in the section is consent

given by the owner of the land as of 4 February 1997, who had prior to that date given respondent consent to reside on the property, and which consent he had withdrawn prior to 4 February 1997. The section, they argued, did not refer to consent given and withdrawn by a previous owner. As appellants, who were the owners on 4 February 1997, had not given respondent consent to be on the land, he could not be an occupier, they argued. To find otherwise would be to deprive appellants of their "vested" right of ownership in the land, an injustice which the legislature must be presumed not to have intended. It would also result in a retrospective application of the statute, a consequence which the legislature must also be presumed not to have intended.

[6] Following upon the magistrate's finding that the respondent was an occupier and the judgment upholding the special plea with costs, the appellants appealed to this Court on the following grounds:

> "1 The Magistrate erred in finding that the Respondent is an `occupier' within the meaning of the Extension of Security of Tenure Act No. 62 of 1997 and that the Act is applicable in the case.
>
> 2 The Magistrate erred in not having sufficient regard to the fact that the following were common cause between the parties:
>
> (a) that the previous owner of the relevant farm, one Mr A.M.Van Der Merwe, cancelled/withdrew his consent to the Respondent to be on the land prior to Mr VAN DER MERWE selling the farm to the Appellants;
> (b) that Mr VAN DER MERWE sold the farm to the Appellants on 20 September 1995;
> (c) that the Appellants were given possession with vacant occupation of the farm in terms of the sale agreement;
> (d) that the Appellants had at no stage given the Respondent permission or consent to be on or to occupy the relevant farm;
>
> 3. The Magistrate erred in finding that the deeming provision in Section 3 (2) of the Extension of Security of Tenure Act No. 62 of 1997 is applicable in this case, despite the fact that:
>
> (a) that it is common cause that the Appellants as owners of the property had never given the Respondent permission or consent (expressly or tacitly) to occupy the property;
> (b) that the Appellants, when they purchased the property on 20 September 1995, were given possession with vacant occupation, in other words without any limitation on their rights as owners of the land;
> (c) that the deeming provision of Section 3 (2) must be restrictively interpreted;
> (d) that there is a presumption against interpreting a statute in such a way as to make it apply retrospectively;
> (e) that the `consent' required to have been present prior to 4 February 1997 is consent `of the owner, or person in charge of the land in question' (Section1(1)(i)), in other words consent of the present owners (namely the Appellants) and not the consent of a prior owner of the land."

The respondent made no submissions for the purposes of the appeal and was unrepresented thereat. His position was explained in a letter sent to the Court before the hearing by Attorneys De Klerk & Associates, the relevant extract of which states:

> ". . . .
> Kindly take note that our offices were instructed to act as correspondents by the Rhodes University Legal Aid Clinic. We have, since the trial not received any further instructions and accordingly have no instructions regarding the Appeal.
>
> We wish to place on record that we agree with the Magistrates judgment handed down on the 25th August 1998. Our failure to oppose the present appeal should not be seen that we agree with same.
> . . . ."

[7] It is common cause that if the respondent is found to be an occupier in terms of section 3(2)(a), the appeal must fail. For respondent to be an occupier in terms of the deeming provision in section 3(2)(a), I am required to find that the consent referred to in the section includes consent of the previous owner and is not confined to consent of the appellants who were the owners on 4 February 1997 (or their successors in title). An enquiry into the meaning of the words "consent" and "owner" in the Tenure Act, and an application thereof to the current matter is crucial to this exercise. Section (1)(i) of the Tenure Act defines the word "consent" as follows:

> "`consent' means express or tacit consent of the owner or person in charge of the land in question . . ."

The consent contemplated in the Act is therefore either that of the owner or person in charge.

Section1(xiii) defines "owner" as follows:

> "`owner' means the owner of the land <u>at the time of the relevant act, omission or conduct</u> . . ."
> (my emphasis)

"Person in charge" is in turn defined at section1(xiv) as:

> "`person in charge' means a person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question."
>
> (my emphasis)

[8] Mr Koekemoer, for the appellants, conceded that in interpreting section 3(2)(a), the definitions of "consent" and "owner " in section 1 must be applied . As appears from the definitions, the consent is that of the owner or person in charge. The definitions of "owner" and "person in charge" expressly recognise that ownership and control are not fixed but vary from time to time. The definition of owner identifies that person as being the owner "at the time of the relevant act omission or conduct". "Act, omission or conduct" includes acts, omissions or conduct relating to consent. This much is clear from the definition of "person in charge" in that the act, omission or conduct must have been by a person who has or had legal authority to consent.

[9] Applying this analysis to the present matter, the only act, omission or conduct relating to consent was the granting and later withdrawal of consent by the previous owner, Mr van der Merwe. That ineluctably, draws the previous owner into the picture as far as section 3(2)(a) is concerned.

[10] Mr Koekemoer conceded that there was no relevant act, omission or conduct on the part of the appellants, the owners on 4 February 1997. However, he argued that this was not enough to rebut the statutory presumption against retrospectivity. I disagree. From a proper application of the definitions to which I have referred, as well as the provisions of section 3(2), it becomes clear that retrospectivity was intended by the Act and, harsh though the consequences thereof for the current owner may be, the presumption against retrospectivity must "yield to the intention of the legislature."[1] I accordingly find that the consent referred to at section 3(2) includes that of the previous owner, and that the respondent is consequently deemed to be an occupier under section 3(2)(a).

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[1] *Kruger v President Insurance Company Limited* 1994 (2) SA 495 (D&CLD) at 502J-504E.

[11] For all of the above reasons the appeal is dismissed. Inasmuch as respondents did not formally oppose the appeal but chose to abide the decision of the Court, the question of costs does not arise.

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JUDGE Y S MEER

I agree

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JUDGE A C DODSON

Heard on: 17 March 1999 **Handed down on:** 16 April 1999

For the appellants:
Adv J R Koekemoer instructed by Neave Stotter & Associates, Port Alfred