IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC25R/99
In Chambers: **MEER J**

MAGISTRATE'S COURT CASE NUMBER: 10/98

In the review proceedings in the case between:

CEPHAS MTHEMBU Plaintiff

and

INNOCENT TANGO Defendant

MAGISTRATE'S COURT CASE NUMBER: 18/98

In the review proceedings in the case between:

CEPHAS MTHEMBU Plaintiff

and

JAMESON MOTHA Defendant

JUDGMENT

MEER J:

[1] This is an automatic review in terms of section 19(3)[1] of the Extension of Security of Tenure Act (hereinafter referred to as "the Act"),[2] of an order by the magistrate of the Louwsburg Magistrate's Court . The order, granted in cases 10/98 and 18/98, is for the eviction of the

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1 Section 19 (3) provides:

> "Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before 31 December 1999, shall be subject to automatic review by the Land Claims Court . . ."

2 Act 62 of 1997.

defendants from plaintiff's farm. Because of the similarities in both cases, they were, by agreement heard together. The defendant in Case 10/98 is Innocent Tango whilst the defendant in 18/98 is Jameson Motha.

[2] Before going on to consider whether the evictions were properly granted in accordance with the Act, I must express my concern that this case was referred for automatic review almost five months after the eviction order was granted on 26 January 1999. The record and pleadings were dispatched to the Land Claims Court for automatic review only on 8 June 1999 from the Louwsburg Magistrate's Court and received by the Registrar of this Court on 21 June 1999. It is unacceptable that such a long period should be allowed to lapse between an eviction and its referral for automatic review. The reason for compulsory automatic reviews of evictions by magistrates, is to ensure that until evictions under the Act become common-place, the novel eviction procedures introduced by this somewhat complex legislation, are adhered to. If eviction orders are not timeously referred to this Court, evictions, possibly even of an irregular nature may well have occurred, by the time an order arrives at this Court to be reviewed. This not only defeats the purpose of the Act but also renders the review process purely academic. It is necessary that files for review be despatched to this Court promptly.[3] I have neither been provided with nor have I been able to ascertain reasons for the late

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3 In this regard, see also the new rule 35A inserted to the Land Claims Court Rules by section 6 of GN Notice No 594 contained in Government Gazette No 20049 of 7 May 1999:

> "35A **AUTOMATIC REVIEW**
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> (1) A magistrate making an order for eviction under the Extension of Security of Tenure Act must -
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> (a) allow not less than 15 days for the review process in determining the date for vacation of the land and the date on which the eviction order may be carried out, unless the urgency of the matter justifies a shorter period;
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> (b) forthwith transmit to the Court the record of the proceedings and his or her reasons for the order; and
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> (c) inform the parties to the proceedings who were present when the order was applied for or when the order was made that the record of the proceedings will be transmitted to the Court for automatic review.

referral in this case. Whatever underlying reasons there may be, a delay of five months is too long. The wheels of justice should not be permitted to turn this slowly.

[3] In this case upon receipt of the record and pleadings the Registrar was able to establish (not without difficulty, after several telephone calls to the Louwsburg Magistrate's Court and the legal representatives for the parties), that the execution of the eviction orders was awaiting the review thereof by this Court. This is a further fact which, in my view, renders the delayed referral intolerable. It is also undesirable that the Registrar had to be put to this trouble. Section 12 [4] of the Act requires the court which grants an eviction order to specify the date for the eviction to be carried out. Eviction dates should therefore be clear from the record and the Registrar should not have to phone around to determine this information.

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(2) Before deciding a matter coming before it on automatic review, the Court may -

(a) seek further information from the magistrate;

(b) afford any party an opportunity to deliver submissions or further submissions on specific issues; or

(c) set the matter down for oral argument before the Court.

(3) After a review has been decided, the Registrar must return the record of the proceedings to the magistrate."

4 Section 12(1) provides as follows:

"**12. Further provisions regarding eviction.**

(1) A court that orders the eviction of an occupier shall—

(a) determine a just and equitable date on which the occupier shall vacate the land; and

(b) determine the date on which an eviction order may be carried out if the occupier has not vacated the land on the date contemplated in paragraph (a)."

Factual background

[4] The plaintiff issued virtually identical summonses out of the Louwsburg Magistrate's Court against the defendants for their eviction in terms of the Act. The plaintiff is the owner of the farm Cornelia, district Ngotshe, Louwsburg, Kwa Zulu-Natal. The defendants are occupiers on his farm. In the particulars of claim in case 10/98, plaintiff prays for judgment against the defendant Tango as follows:

> " (a) An order for the ejectment of the defendant from the premises;
> (b) Payment of the amount of R500,00;
> (c) Interest at 15.5% per annum *a tempore morae*, calculated on the rental for each month as it became due and payable;
> (d) Costs of suit
> (e) Further and/or alternative relief."

The judgment prayed for in case 18/98 against defendant Motha is identical, save that the amount claimed in prayer (b) is R3 440,00.

[5] Plaintiff, in his particulars of claim alleges:

5.1 that in terms of an oral lease agreement with the defendants he leased a certain portion of the farm to them for a monthly rental of R100,00 per month in respect of defendant Tango and R80,00 per month in respect of defendant Motha;

5.2 that a term of the oral lease agreements was that if the defendants failed to pay the rental or any part thereof on due date, the plaintiff would be entitled to cancel the lease, claim the arrear rental and evict the defendants from the premises;

5.3 that despite demand the defendants had failed to pay arrear rentals and as a result of such breach, plaintiff had canceled the agreement

[6] Annexed to each summons as Annexure "A", is a return of service and a virtually identical letter of demand from plaintiff's attorney to defendants. The returns of service describe the letters as "notice of ejectment". The relevant part of the letter to defendant Tango reads as follows:

> "It is our further instruction to demand as we hereby do the outstanding amount of R500,00 to be paid within twenty one (21) days from date hereof at the offices of Cox &Partners, failing which you are to vacate the premises with your livestock, pets, children and other family members by no later than 31 March 1998."

The letter to defendant Motha is identical save that it demands payment of R3 440,00.

[7] Annexed also to each summons as Annexure "B" is a letter from plaintiff's attorney to the Department of Land Affairs which the particulars of claim refer to as a notice of eviction to that Department in terms of the Act.

[8] Each defendant pleaded that whilst the concept of a lease agreement was proposed to him by plaintiff, no valid and binding lease agreement was concluded. Instead, the plaintiff had unilaterally imposed a monthly rental upon him. He had indicated to plaintiff that he was not in a financial position to pay any rent and offered instead to provide labour to plaintiff. In affidavits opposing summary judgment both defendants moreover alleged that they were resident on the farm on 4 February 1997 with the consent and knowledge of the plaintiff, that their rights of residence had not been terminated on any lawful ground, alternatively terminated in a manner which is just and equitable and that the plaintiff had not complied with the provisions of the Act prior to his commencement of the action. The court was, therefore, precluded from making an order for ejectment.

[9] The opposing affidavit of defendant Motha in addition alleged that he was a labour tenant in accordance with the Land Reform Labour Tenants Act [5], alternatively an occupier in terms of the Act.

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5 Act 3 of 1996.

[10] At the hearing five witnesses testified for the plaintiff and the two defendants testified for the defence. The evidence focused on whether there was an oral lease agreement between the plaintiff and the defendants for the payment of rent as alleged by the plaintiff.

[11] The Magistrate gave no reasons for the orders evicting the defendants. The orders read as follows:

> "Uitspraak: Saak 10/98
> Vonnis as volg t.g.v. eiser toegestaan teen verweerder.
> 1. Uitsettingsbevel teen verweerder vanaf die plaas Cornelia.
> 2. Betaling van die bedrag van R500-00 teen 15,5% rente per jaar a tempore morae.
> 3. Koste van die geding.
>
> G.I. Kruger
> Landros
> 26/1/99
>
> Saak 18/98
>
> Vonnis as volg t.g.v. die eiser teen verweerder.
> 1. Uitsettingsbevel teen verweerder vanaf die plaas Cornelia.
> 2. Betaling van die bedrag van R3440-00 teen 15.5% rente per jaar a tempore morae
> 3. Koste van die geding.
>
> G.I. Kruger
> Landros
> 26/1/99

[12] The brevity of the judgment is somewhat surprising given that there were seven witnesses in total. There is no explanation by the Magistrate as to how their testimony was weighed up in arriving at a decision.

Compliance with the pre-requisites for an eviction order

[13] It now falls upon me to determine whether the order granted by the Magistrate was in compliance with the requirements set out at section 9(2) of the Act.The pre-requisites for an eviction in terms of the Act are set out in section 9(2) of the Act.[6] It reads as follows:

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6 See, for example, *Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC) at 1019D-1020D, [1998] 3 All SA 625 (LCC)at 630f-631d

"**9. Limitation on eviction**.

. . . .

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 of 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."

Compliance with paragraph (a) of section 9(2)

[15] With regard to paragraph (a) of section 9(2) there is nothing from the evidence or the order to indicate that the Magistrate specifically considered whether the defendants' rights of residence had been terminated in terms of section 8. Section 8(1) is relevant in this case. It provides:

"**8. Termination of right of residence.**

(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to -

(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner of person in charge relies;

(b) the conduct of the parties giving rise to termination;

(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;

(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and

> (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence."

[16] With regard to paragraph (a) of section 8(1), it can be said that the plaintiff relied on the purported oral agreement of lease entered into with both defendants. There is no indication that the Magistrate considered the fairness of the agreement. As has been stated, the evidence presented focused on the existence of the agreement rather than the fairness thereof. Given however that the Magistrate arrived at a decision to evict, it is probable that the fairness of the agreement played a part in arriving at this decision. I am therefore prepared to accept that there was substantial compliance with section 8(1)(a).

[17] With reference to paragraph (b) of section 8(1) both the pleadings and the evidence pointed to the failure of the defendants to pay the rent in accordance with the alleged oral lease. Therefore it can be said that the Magistrate considered the conduct of the parties giving rise to the termination.

[18] With reference to paragraphs (c), (d) and (e) of section 8(1) there is no indication that the Magistrate had regard to these factors.

[19] By reason of the Magistrate's failure to consider paragraphs (c), (d) and (e) of section 8(1), there has not been a proper finding as to whether or not the defendants rights of residence had been terminated in terms of section 8. Accordingly section 9(2)(a) has not been complied with.

Compliance with paragraph (b) of section 9(2)

[20] With reference to paragraph (b) of section 9(2) the Magistrate clearly did not consider specifically whether defendants had vacated the land within the period of notice. However it is clear on the papers that the defendants did not vacate by 31 March 1998, the date specified in the letter[7]

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7 Supra para [6].

by which they had to vacate in the event of their not paying the arrear rental. There has accordingly been compliance with this paragraph.

Compliance with paragraph (c) of section 9(2)

[21] It is clear that the defendants were occupiers on 4 February 1997. In order to comply with paragraph (c), it would, therefore, have been necessary for the Magistrate to consider if the conditions for an eviction in terms of section 10 of the Act had been complied with. This simply did not happen. There is no mention of section 10 in the Magistrate's order. Section 10(1)(b) and (c) are relevant to this case. They provide:

> "**10. Order for eviction of person who was occupier on 4 February 1997**.
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> (1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if -
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> (a) . . .
> (b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice in writing to do so;
> (c) 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, either at all or in a manner which could reasonably restore the relationship;
> . . . . "

The record and pleadings indicate that some of the issues referred to at paragraph 10 (1)(b) were canvassed. Plaintiff's evidence was that he had performed in terms of an oral lease agreement and that the defendants were in breach. Plaintiff had also given written notice to the defendants to pay the arrear rental. However, the notice period provided in the notice letter, (Annexure "A" to the summons)[8] is twenty one days and not one calendar month's written notice as provided at section 10(1)(b). I do not find from the record and pleadings that the issues at section 10(1)(c) were

8 Supra para [6].

canvassed. In the circumstances there has been no compliance with section 9(2)(c) and accordingly with section 10 of the Act.

Compliance with paragraph (d) of section 9(2)

[22] With reference to paragraph (d) of section 9(2) and the requirements of written notices of plaintiff's intention to obtain an eviction order, referred to therein I find as follows:

22.1 No notice of intention to obtain an eviction order was given to the occupiers, the defendants, in this case. It is evident from the particulars of claim that the plaintiff appeared to regard the letters of demand[9] from plaintiff's attorney to defendants, to be the written notices of his intention to obtain an order for eviction in compliance with section 9(2)(d)(i). The letters dated 5 January 1998 do provide a date, 31 March 1998, two months thence by which defendants are required to vacate the land by, in the event of arrear rentals not being paid within 21 days. This is, however, not the same as a notice of intention to obtain an order for eviction within two calendar months as is required by section 9(2)(d). From the record it is also clear that the plaintiff did not give notice of application to a court, two months before the date of the hearing, in accordance with the proviso to section9(2)d(i)[10]. I therefore find that the plaintiff did not give the defendants the relevant notice of intention to obtain an order for eviction.

22.2 No notice of intention to obtain an order for eviction was given in accordance with section 9(1)(d)(ii) to the municipality in whose area of jurisdiction the land in question is situated.

22.3 With regard to the notice of intention to obtain an order for eviction to the Department of Land Affairs in accordance with section 9(2)(d)(iii), plaintiff's

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9 Supra para [6].

10 Supra para [13].

particulars of claim allege that such notice was given in the letter marked Annexure "B" from plaintiff's attorneys to the Department of Land Affairs. The letter does not mention the two defendants by name. It does however state:

> ". . . .
> We hereby confirm that Notice of our Intention to Evict 13 families from our client's, Mr Mthembu's farm, was served on you on 12/01/1998. A copy of each of the notices sent to each of the families on Mr Mthembu's farm was kept by yourself for easy reference.
> . . . . "

The letter then goes on to provide the reasons for plaintiff's intention to evict. Annexure "B" like the letters of demand to the defendant failed to specify two calendar months' notice as is required at section 9(2)(d)(iii). I find that notice was not properly given to the Department of Land Affairs.

Accordingly there has not been compliance with section 9(2)(d) of the Act.

Compliance with section 12

[24] When granting an eviction order, a magistrate is also required to take into account subsections (1) and (2) of section 12[11]. Section 12(1) requires the magistrate, when making an eviction order, to determine two dates. Firstly, he or she must determine "a just and equitable date on which the occupier shall vacate the land".[12] Secondly, he or she must determine a "date on which an eviction order may be carried out if the occupier has not vacated the land on the date contemplated in paragraph (a) [that is the first date referred to]".[13] The Magistrate failed to comply either with section 12(1)(a) or (b) in that he specified no dates whatsoever to the eviction order.

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11 See also *Roux v Lekekiso* [1998] JOL 4157 (LCC), internet web site address: http://www.law.wits.ac.za/lcc/lccalph.html at paras [7] to [10].

12 Section 12(1)(a).

13 Section 12(1)(b).

[25] I accordingly make the following order in terms of paragraphs (b) and (c) of section 19(3) of the Act:

1. The eviction order granted on 26 January 1999 by the Magistrate for the District of Ngotshe held at Louwsberg in case 10/98 is set aside.[14]

2. The eviction order granted on 26 January 1999 by the Magistrate for the District of Ngotshe held at Louwsberg in case 18/98 is set aside.[15]

3. The orders for eviction in case 10/98 and 18/98 are replaced with the following order:

" A decree of absolution from the instance is granted with costs"

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JUDGE Y S MEER

Handed down on: 12 July 1999

14 This Court derives its automatic review powers from section 19(3) of the Act and only in respect of orders for eviction; not for arrear rental. See *Nietvoorbij v Klaasen*, [1999] JOL 4535 (LCC), internet web site address: http://www.law.wits.ac.za/lcc/1999/nietsum.html at para [4].

15 Ibid.