IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER:** LCC64R/99
In chambers: **GILDENHUYS J** **MAGISTRATE'S COURT CASE NUMBER:**5684/99

In the review proceedings in the case between:

RAINBOW FARMS (PTY) LTD Plaintiff

and

DAWID FRANSMAN Defendant

JUDGMENT

GILDENHUYS J:

[1] This matter comes before me on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act [1] (hereinafter "the Tenure Act).

[2] The plaintiff is the owner of the farm generally known as Geluk, in the district of Worcester. The defendant was employed by the plaintiff on the farm, and lived in a dwelling on the farm. His right of residence arose solely from the employment agreement. The parties accept that the defendant is an occupier of the farm, within the meaning given to that term in the Tenure Act.

[3] According to the plaintiff, the defendant voluntarily resigned his employment in circumstances that do not amount to a constructive dismissal. Because he did not vacate the dwelling in which he was living, the plaintiff caused the necessary notices to be given to the defendant in order to comply with the requirements for an eviction order under the Tenure Act.[2] Thereafter the plaintiff proceeded to have a summons served on the defendant wherein his eviction from the farm is claimed.

[4] The defendant delivered a notice of intention to defend the claim. The plaintiff was of the view that the notice of intention to defend is deficient, and it caused a notice calling for the

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1 Act 62 of 1997, as amended.

2 The prerequisites for an eviction order under the Tenure Act are set out in section 9(2) of the Tenure Act.

rectification of the deficiencies to be served on the defendant under rule 12(2)(a) and (b) of the Magistrates' Courts rules. The notice reads:

> "GELIEWE KENNIS TE NEEM dat Eiser die Verweerder hiermee versoek om 'n behoorlike kennisgewing van voorneme om te verdedig binne 5 (vyf) dae na ontvangs van hierdie kennisgewing af te lewer.
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> Verweerder se kennisgewing van voorneme om te verdedig is gebrekkig in die volgende opsigte:
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> 1 Die dokument is nie behoorlik deur of namens die Verweerder onderteken nie;
> 2 Die dokument bevat nie 'n posadres van die persoon wat dit onderteken het of 'n adres vir betekening soos in Reël 13 bepaal."

The notice to rectify was served by the Sheriff on defendant's wife.

[5] The defendant did not rectify the deficiencies complained of. The plaintiff then, without notice to the defendant, applied for and obtained default judgment. The defendant was ordered to vacate the farm by 2 November 1999, failing which the eviction order could be implemented on 4 November 1999.

[6] I was not convinced that the requirements of the Tenure Act for an eviction order have been complied with. I invited the plaintiff and the defendant to make submissions to me, and I also invited the Magistrate who gave the default judgment to give supplementary reasons, should he wish to do so. The plaintiff made detailed submissions to me. The defendant did not make submissions. However, the Worcester district office of the Department of Land Affairs forwarded to me a plea to plaintiff's particulars of claim, signed by defendant personally. The Magistrate informed me that he did not wish to give supplementary reasons for the default judgment.

[7] Section 17(3) and (4) of the Tenure Act contain the following provisions on the procedure applicable in magistrates' courts to cases under the Tenure Act. The subsections read as follows:

> "(3) The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), may make rules to govern the procedure in the High Court and the magistrates' courts in terms of this Act.
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> (4) Until such time as rules of court for the magistrates' courts are made in terms of subsection (3), the rules of procedure applicable in civil actions and applications in a High Court shall apply *mutatis mutandis* in respect of any proceedings in a magistrate's court in terms of this Act."

No rules have been made by the Rules Board to govern proceedings in a magistrate's court in cases under the Tenure Act. Accordingly, the rules of procedure applicable in civil actions and applications in the High Courts are applicable. The notice given to the defendant to rectify the deficiencies in the notice of appearance was given under the rules of the magistrates' courts, which do not apply.

[8] Under the rules of procedure applicable in the High Courts, the delivery of a notice of appearance to defend which do not comply with the formal requirements for such a notice, is an irregular step. Rule 30 of the Uniform High Court rules deals with irregular proceedings. The relevant subrules read as follows:

> "(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
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> (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if -
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> (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
> (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
> (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule 2.
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> (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet."

Until a defective notice of appearance is set aside, it stands. A party's proper cause where a notice of appearance is defective is not to proceed as if there had been no such notice at all, but to apply to court to set the defective notice aside.[3]

[9] Mr le Roux, on behalf of the plaintiff, submitted that in terms of the Uniform High Court rule 31(2)(a) read with the Uniform High Court rule 31(4), a plaintiff is entitled to apply for default judgment without first applying to have the irregular notice of appearance set aside, and without notice of the application to the defendant. The subrules referred to do not support this submission. They read as follows:

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3 See Erasmus, *Superior Court Practice*, Service 4 (Juta & Co Ltd, Cape Town 1995) at B1-191 and the cases listed in footnote 6 thereof.

> "31(2)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, where the claim is for a debt or liquidated demand, without hearing evidence, and in the case of any other claim, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.
>
> (4) The proceedings referred to in subrules (2) and (3) shall be set down for hearing upon not less than five days' notice to the party in default: Provided that no notice of set down need be given to any party in default of delivery of notice of intention to defend."

A defective notice of appearance cannot just be ignored. Until it is set aside by the court, it stands. Accordingly, an application for default judgement in terms of rule 31(2)(a) [assuming this rule to be applicable] should have been on notice to the defendant.

[10] Furthermore, the notice which the plaintiff caused to be served on the defendant in terms of section 9(2)(d)(i) of the Tenure Act contains a statement to the effect that the plaintiff must ensure that the defendant is told when and where the case will be heard. Although form E to the Security of Tenure Act regulations [4] requires such a statement to be included in the notice, such inclusion is legally incorrect. This Court has previously held [5] that the statement is best omitted from the notice. However, should it be included, it must be implemented.[6] Mr le Roux, on behalf of the plaintiff, attempted to justify the failure to implement it by pointing to the following statement, which is also contained in the section 9(2)(d)(i) notice given to the defendant:

> "The summary contained in this notice of your legal position is incomplete, for further information you should immediately contact a lawyer, a non-governmental organisation or the Department of Land Affairs."

The plaintiff intimated to the defendant in the section 9(2)(d)(i) notice that the defendant will be informed when and where the case will be heard. The inclusion of that intimation in the notice requires the plaintiff to make it good.

[11] It follows that the default judgment given by the Magistrate cannot be sustained, firstly because the notice of appearance stands until it is set aside by the court, and secondly because the application for default judgment should have been on notice to the defendant. The defendant has

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4 The regulations are contained in Government Notice R1632 of 18 December 1998.

5 *Denleigh Farms and Another v Mhlanzi and Others*, LCC22R/99, 25 June 1999, as yet unreported at paras [10] to [12].

6 This means that the defendant must be informed when the application for default judgment will be heard, notwithstanding that such notification may not be necessary under the applicable rules of court.

now filed a plea, and the case will have to proceed as a defended matter. In saying this, I do not preclude the plaintiff from bringing a fresh application to have any proceedings set aside which it considers to be irregular, should it be so advised.

[12] Because the case will now proceed as a defended matter, it will be inappropriate for me, on the limited information contained in the papers before me, to make any finding as to whether the statutory prerequisites for an eviction order have been fulfilled. I will leave this issue open.

[13] Finally, I need to say something about the plea. It was forwarded to me by the Department of Land Affairs. Although it was signed by the defendant personally, it was evidently drafted by a person with legal skills. The Department of Land Affairs may have had a hand in the drafting. It is important for the proper administration of justice that the defendant obtains legal representation. If the present difficulties surrounding the Legal Aid Board impede the involvement of a legal representative, it would be a great pitty. The Tenure Act is an intricate piece of legislation, and it can only be properly implemented if all parties are adequately represented.

[15] I order as follows:

a the default judgment given by the Magistrate of Worcester on 12 October 1999 is hereby set aside in full;

b the matter is remitted to the Magistrate's Court to proceed as a defended action, subject to all the rights which the parties may have under the Uniform Rules of Procedure for the High Courts and under the Extension of Security of Tenure Act.

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JUDGE A GILDENHUYS

3 November 1999

For the plaintiff:
Mr D C le Rous of Maritz, Murray & Fourie.