

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NUMBER: LCC 83R/00

MAGISTRATE'S COURT CASE NUMBER: 5077/99

In chambers: **MEER AJ**

Decided on: 26 October 2000

In the review proceedings in the case between:

SWARTZ, CA

Plaintiff

and

MALOPE, J

Defendant

JUDGMENT

MEER AJ:

[1] This is an automatic review under section 19(3) of the Extension of Security of Tenure Act¹ (hereinafter referred to as "ESTA") of an eviction order granted by the Magistrate, Ermelo on 5 January 2000, for the eviction of the defendant from the farm Bosmanskrans 217, Ermelo, Mpumalanga. The eviction order was granted by way of default judgment, in the absence of the defendant who did not enter an appearance to defend.

Facts

[2] The following facts emerge from the particulars of claim:

- The plaintiff inherited the farm on 23 August 1977.

1 Act 62 of 1997, as amended.

- The defendant started working on the farm in August 1989, as per agreement with a certain Mr Von Wielligh.²
- The defendant resigned voluntarily on 31 July 1997 but failed to vacate the farm despite agreeing to do so before December 1997 and despite receiving a wage until October 1997.
- The defendant was an occupier³ on the farm and his eviction was sought in terms of ESTA.

[3] Before a court can grant an order for the eviction of an occupier there must be compliance with the procedural and substantive requirements contained in section 9(2) of ESTA. Section 9(2) of ESTA reads as follows:

“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 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

2 Although the particulars of claim state that the will and deed of transfer are attached, these documents do not appear in the papers before me. It is moreover not clear what the relationship between Mr Von Wielligh and the plaintiff is.

3 An occupier is defined in section 1 of ESTA as follows:

“a person residing on land which belongs to another person, and who has or on [sic] 4 February 1997 or thereafter had consent or another right in law to do so, but excluding -

- (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996);
- (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
- (c) a person who has an income in excess of the prescribed amount;”

- (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."

It does not appear from the papers before me that the magistrate applied his mind as to whether there had been compliance with section 9(2) of ESTA before granting the eviction. Other than a signature and the words "Vonnis toegestaan" on the plaintiff's application for default judgment there are no reasons provided for the decision. From the papers it is clear that there has certainly not been compliance with section 9(2)(d) and the eviction order stands to be set aside for that reason alone. None of the other subsections of section 9 were specifically referred to in the particulars of claim. I find, however, that these subsections were complied with as appears more fully below.

Compliance with section 9(2)(a)

[4] I find that there was compliance with section 9(2)(a). The particulars of claim state that the defendant's right of residence was terminated in terms of section 8(2)⁴ when he resigned voluntarily from his employment. It would have been preferable for details to have been given as to why he resigned and under which circumstances. This notwithstanding I accept that the subsection has been complied with.

4 Section 8(2) reads as follows:

"The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act."

Compliance with section 9(2)(b)

[5] I find that there was compliance with section 9(2)(b) as the particulars of claim state that the plaintiff gave the defendant written notice to vacate the farm when his right of residence was terminated.

Compliance with section 9(2)(c)

[6] As is clear from a reading of section 9(2)(c) either section 10 or section 11 must be complied with in order for there to be compliance with section 9(2)(c). In this case section 10 is applicable as the defendant resided on the farm on 4 February 1997. In terms of section 10(1)(d) an eviction order can be granted against an occupier whose right of residence arises solely from his employment and who has resigned voluntarily in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act. I accept that there has been compliance with section 9(2)(c).

Non-compliance with section 9(2)(d)

[7] In contravention of section 9(2)(d) the plaintiff failed to serve the requisite notices on the defendant, the municipality and the head of the provincial office of the Department of Land Affairs.

Section 9(3)

[8] Section 9(3) was inserted by section 10 of the Land Affairs General Amendment Act, 11 of 2000 which came in operation on 24 March 2000. Had all the other requirements of ESTA been complied with I would have had no hesitation in finding that section 9(3) has no application in this matter as judgment was granted before the introduction of section 9(3) in March 2000. However as I am setting aside the eviction order section 9(3) will have to be considered in the event of the plaintiff re-applying for an eviction order.⁵

⁵ See *Pitout v Mbolane* [2000] 2 All SA 379 (LCC) at para [18]. Compare *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another* [2000] 3 All SA 279 (LCC) at paras [14]- [19].

Non-compliance with section 12

[9] When granting an eviction order, a Court is required to comply also with section 12(1).⁶ Section 12(1)(a) requires the court to determine “a just and equitable date on which the occupier shall vacate the land.” Section 12(1)(b) requires the court to 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 section 12(1)(a). These dates were not determined.

Non-compliance with section 13

[10] Section 13 makes it incumbent on a court granting an eviction order to enquire into whether the occupier is entitled to compensation for structures, improvements, crops or outstanding wages.⁷ This section was also not complied with.

Non-compliance with the rules

[11] I note that in contravention of section 17(4) of ESTA⁸ the summons complied with the magistrates’ court rules of procedure instead of those for a High Court. The summons allows a five-day

6 See *Roux v Lekekiso*, LCC 13R/98, 16 November 1998, [1998] JOL 4157 (LCC), internet web site <http://www.law.wits.ac.za/lcc/lccalph.html> at paras [7] - [10].

7 See *Ferguson v Buthelezi and Another*, LCC 41R/99, 23 September 1999, [1999] JOL 5408 (LCC), internet web site <http://www.law.wits.ac.za/lcc/1999/fergusonsum.html> at paras [19] - [22]; *Nel v Calitz and Another*, LCC 63R/99, 1 November 1999, [1999] JOL 5717 (LCC), internet web site <http://www.law.wits.ac.za/lcc/1999/nelsum.html> at paras [19] - [21].

8 Section 17(4) provides as follows:
 “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.”

period for the defendant to enter an appearance to defend as opposed to the ten-day period provided for in rule 19(1) of the High Court Rules.⁹ The Court has criticised this practice on several occasions.¹⁰

[12] Finally I note my extreme displeasure at the fact that this matter was referred to the Land Claims Court for automatic review all of eight months after the eviction order was granted and after a warrant for the eviction of the defendant was about to be executed. Such delays in review referrals have also been criticized by this Court in several judgments.¹¹ The issue has also been the subject of a practice direction circulated to magistrates by the Court.¹² It is inexcusable that the practice persists.

ORDER

[13] I make the following order:

- (a) The order for the eviction of the defendant granted by default in the Ermelo Magistrate's Court on 5 January 2000 under case 5077/99 is set aside in its entirety;
- (b) The matter is remitted to the Magistrate, Ermelo;
- (c) The plaintiff must comply with section 9(2)(d) of the Extension of Security of Tenure Act, 62 of 1997;

9 Rule 19(1) provides as follows:

“Subject to the provisions of section 27 of the Act, the defendant in every civil action shall be allowed ten days after service of summons on him within which to deliver a notice of intention to defend, either personally or through his attorney: Provided that the days between 16 December and 15 January, both inclusive, shall not be counted in the time allowed within which to deliver a notice of intention to defend.”

10 See *Spies v Mahlangu*, LCC 19R/00, 22 March 2000, [2000] JOL 6330 (LCC), internet web site <http://www.law.wits.ac.za/lcc/2000/19r00sum.html> at para [5]. See also *Van Zyl NO v Maarman*, LCC 49R/00, 24 July 2000, internet web site <http://www.law.wits.ac.za/lcc/2000/49r00sum.html> at para [3].

11 Delays in referrals of cases for automatic review to the Land Claims Court have been criticized in various judgments of this Court. See for example *Roux v Lekekiso* above n 7 at paras [7] - [10]; *Mthembu v Tango*, *Mthembu v Motha*, LCC 25R/99, 12 July 1999, [1999] JOL 5123 (LCC), internet web site <http://www.law.wits.ac.za/lcc/1999/mthembusum.html> at paras [2] and [24].

12 The practice direction has also been published in (1999) 2 *Judicial Officer* at page 96.

- (d) The matter may then be set down for rehearing;
- (e) When rehearing the matter the magistrate is required to comply with sections 9(3), (12) and (13) of the Extension of Security of Tenure Act, 62 of 1997;
- (f) In the event that an eviction is granted the magistrate must forward the papers to this Court for review in terms of section 19(3) and make an order in terms of section 19(5);
- (g) The parties are directed to behave towards each other without hostility pending the resolution of this matter.

ACTING JUDGE YS MEER

For the plaintiff:

Bekker Brink & Brink Inc, Ermelo.

For the defendant:

Unrepresented.