IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG **CASE NUMBER**: LCC 40R/01
MAGISTRATE'S COURT CASE NUMBER: 2964/2000

In chambers: **MOLOTO AJ**

Decided on: 4 May 2001

In the review proceedings in the case between:

WITZENBERG PROPERTIES (PTY) LTD Applicant

and

PRETORIUS, W Respondent

JUDGMENT

MOLOTO AJ:

Background

[1] This is an automatic review in terms of section 19(3) of the Extension of Security of Tenure Act[1] (hereinafter referred to as "the Act") of the eviction order granted by the Magistrate, Ceres on 8 February 2001 against the respondent from the farm Elandsfontein (hereinafter referred to as "the farm").

[2] The applicant, a company, is the owner of the farm. Mr F J du Toit, the personnel manager, launched the application on behalf of the applicant. Although he stated that he was authorised to bring

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1 Act 62 of 1997, as amended.

the application on behalf of the applicant, no resolution of the applicant authorising him to act on its behalf has been filed.[2]

Is the respondent an occupier?

[3] The respondent left the farm after the proceedings were instituted against him. The applicant's attorney, Ms Deetlefs, informed the Magistrate that the applicant still sought an eviction order against the respondent although he had left the farm. She explained that there are family members of the respondent still living on the farm, therefore he might come to live on the farm again. Ms Deetlefs did not indicate whether or not the applicant is aware of the respondent's present whereabouts.

[4] The question arises whether or not the respondent is an occupier as defined in the Act. The definition of "occupier" reads:

> "a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding-
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> (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996);
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> (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
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> (c) a person who has an income in excess of the prescribed amount;"

Gildenhuys J had cause to consider the definition of "residing" in *Robertson v Boss*[3] and concluded that:

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2 See *City Council of Springs v Occupants of the Farm Kwa-Thema, 210*, LCC10R/98, 2 September 1999, [1999] JOL 5280 (LCC), www.law.wits.ac.za/lcc/1999/springs99sum.html at para [32] where it was held that "[a]lthough it would have been a wise precaution for the applicant to attach an authorising resolution to its papers, this is not strictly necessary."

3 LCC 6R/98, 30 September 1998, [1998] JOL 3751 (LCC), www.law.wits.ac.za/lcc/1998/robertsonsum.html at para [6].

> "Na my oordeel het die woord 'woon', waar dit in die definisie van 'okkupeerder' gebruik word, daardie betekenis. ‘n Persoon is ‘n okkupeerder van grond indien hy of sy daardie grond as sy of haar tuiste beskou. Daar moet ‘n mate van permanensie wees."

In the *Robertson* case, Boss had vacated the house in which he had lived and had gone to live elsewhere. His whereabouts were not known to the applicant. It was clear from the facts of that case that Boss did not consider the house on the applicant's farm to be his residence. Gildenhuys J said the mere fact that Boss had left some of his goods locked up in the house was not enough reason to conclude that he "resided" there. Gildenhuys J then concluded that Boss was not an "occupier" as defined in the Act, as he did not reside on the farm.

[5] It is not clear from the papers in *casu* whether the family members of the respondent live on the farm in their own right or whether they derive the right to reside there from their relationship with the respondent. Du Toit referred to the "occupiers" in the plural,[4] elsewhere he referred to the respondent in the singular. This discrepancy is not explained. An answer to the question whether or not the respondent's family resides on the farm through him is critical to determining whether or not he is an occupier of the farm notwithstanding his departure therefrom. It will therefore be necessary to remit the case to the magistrate for this issue to be resolved. Assuming that the respondent is found to be an occupier, I raise hereunder, other concerns which I have with the case for the magistrate's consideration. If the magistrate's inquiry establishes that the respondent is not an occupier, then this Court will have no jurisdiction to review the matter and the magistrate will be at liberty to dispose of the matter.

Notice of Motion

[6] The Notice of Motion was served on the respondent's sister on 7 November 2000. The notice advised the respondent that should he wish to defend himself, he should indicate his intention to do so

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4 In paragraph 11 for example, Du Toit stated:

> "Die Respondent het verder een jaar en 5 maande kennis gehad dat sy verblyfreg beëindig is en is dit my submissie dat hulle vir die tydperk waarop hulle okkupeer, genoegsame tyd gegun is om die perseel te ontruim." (my emphasis)

in writing on or before 9 November 2000. The notice furthermore advised the respondent that the application would be heard on 16 November 2000 should no notice to defend be forthcoming. The respondent did not oppose the application, which is not surprising given the fact that he was given only two days' notice.[5] This is fatal to proceedings in terms of the Act, however, as I have indicated it is not altogether clear whether the respondent is protected by the Act.[6]

Requirements for an eviction order

[7] In order to obtain an eviction order, the applicant must have complied with the various requirements contained in section 9(2) of the Act. The section reads as follows:

> "(2) A court may make an order for the eviction of an occupier if-
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> (a) the occupier's right of residence has been terminated in terms of section 8;
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> (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
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> (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
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> (d) the owner or person in charge has, after the termination of the right of residence, given-
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> (i) the occupier;
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> (ii) the municipality in whose area of jurisdiction the land in question is situated; and
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> (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."

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5 The application was not based on urgency. Rule 6(5)(b) of the High Court Rules prescribes a 5 day notice period.

6 Although short notice may be condoned under certain circumstances, it is not appropriate to do so in this case because the judgment was granted by default. Besides there was no application for condonation of the non-compliance nor was the short notice explained.

Compliance with section 9(2)(a)

[8] I am satisfied that the respondent's right of residence was terminated in accordance with subsections (2) and (3) of section 8 of the Act.[7] The respondent was dismissed at a disciplinary hearing after he was found to have been drunk on duty. The applicant argued that as the respondent was a fork-lift driver, he was a danger to other workers. The respondent did not challenge the validity of the dismissal in terms of the Labour Relations Act[8] and at the time of the bringing of the application for eviction a period of more that one year and five months had lapsed since such dismissal.

Compliance with section 9(2)(b)

[9] In view of my finding in paragraph [5] above, I cannot find that the respondent did or did not vacate the farm within the notice period given to him, as he left his family members behind. A finding on whether this requirement has been complied with will depend on the outcome of the magistrate's inquiry on the issue raised in paragraph [5] above.

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7 Subsections (2) and (3) of section 8 read as follows:

> "(2)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.
>
> (3) Any dispute over whether an occupier's employment has terminated as contemplated in sub section (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act."

8 Act 66 of 1995.

Compliance with section 9(2)(c)

[10] Section 11 of the Act is applicable to persons who became occupiers after 4 February 1997. The respondent became an occupier on the applicant's farm on 21 May 1997. Subsections (2) and (3) of section 11 are applicable. These read:

> "(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.
>
> (3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to-
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> (a) the period that the occupier has resided on the land in question;
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> (b) the fairness of the terms of any agreement between the parties;
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> (c) whether suitable alternative accommodation is available to the occupier;
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> (d) the reason for the proposed eviction; and
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> (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land."

I am satisfied, having regard to the factors listed above, that there was compliance with all but one of the requirements. Mr du Toit merely stated that the respondent can obtain alternative accommodation on another farm once he has accepted a job on that farm. The statement does not clearly state that suitable alternative accommodation is available to the respondent. It may be so that the respondent has alternative accommodation as he is currently residing elsewhere, but from the statements made on behalf of the applicant, it is not possible for me to determine whether or not that accommodation is suitable for him and his family.[9]

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9 Suitable alternative accommodation is defined in section 1 of the Act as:

> "alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to-
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> (a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
>
> (b) their joint earning abilities; and
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> (c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active;"

Compliance with section 9(2)(d)

[11] I am satisfied with the service of the requisite notices on the municipality and the Department of Land Affairs. With regard to service on the respondent himself, Form E was served in Afrikaans only, although regulation 9(2)[10] requires that a copy of Form E be served in the language best understood by the occupier and in another official language. I am prepared to accept service in Afrikaans only if the language best understood by the respondent is Afrikaans. In that case service in another language would serve no purpose. In this view I am fortified by the decisions of our courts to the effect that rules of procedure should facilitate the expeditious and inexpensive finalisation of cases.[11] If, on the other hand, Afrikaans is not the language best understood by the respondent, Form E will have to be served again.

Compliance with section 9(3)

[12] The section 9(3) report[12] was requested by the magistrate, but the manager of the farm

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10 The regulations are published in Regulation R1632 Government Gazette 19587, 18 December 1998. Form E is part of the annexure and can now be downloaded in all eleven languages from our web site at www.law.wits.ac.za/lcc/forme.htm.

11 See *Motaung v Mukubela and Another, NNO; Motaung v Mothiba, NO* 1975 (1) SA 618 (O) at 625A; *Le Roux v Prins* (1883) 2 SC 405 at 407 per Lord de Villiers CJ, quoted with approval by Wunsh J in *Marigold Ice Cream Co (Pty) Ltd v National Co-Operative Dairies Ltd* 1997 (2) SA 671 (W) at 681C-D:

> "The tendency of recent rules of procedure in this Court has been to sweep away all unnecessary technicalities and hindrances to the speedy and effectual administration of justice."

See also *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654D per Van Winsen AJA:

> "The court does not encourage formalism in the application of the Rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the court."

12 Section 9(3) of the Act provides as follows:

> "For the purposes of subsection 2 (c), the Court must request a probation officer contemplated in section 1 of the Probation Services Act, 1991 (Act No 116 of 1991), or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period-
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> (a) on the availability of suitable alternative accommodation to the occupier;
> (b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;
> (c) pointing out any undue hardships which an eviction would cause the occupier; and
> (d) on any other matter as may be prescribed."

advised the officer compiling the report (a representative of the Department of Land Affairs), that the respondent had left the farm. In order to comply with this section, I am of the view that the fact of the respondent having left the farm is irrelevant. The officer must undertake an investigation into the matters specified in section 9(3) of the Act and report to the court accordingly. If the unavailability of the respondent makes his report incomplete, he must say so, but he should not abdicate his responsibility to submit a report. Particularly if it should be found that the respondent's family members still reside on the farm through their relationship with the respondent, because, in that case, the suitability of the alternative accommodation must take them into account. To the extent that the officer needed to consult with the respondent in this regard, he could have inquired from the respondent's remaining family members as to the respondent's whereabouts. Alternatively or in addition, he could have consulted with those family members.

Non-compliance with section 13

[13] The applicant's attorney filed a supplementary affidavit in which she stated:

> "Ek bevestig verder dat ek navraag gedoen het by die Applikant en hy bevestig het dat na aanleiding van Artikel 13 van Wet 62 van 1997 die Applikant geen uitstaande lone en verwante bedrae ingevolge die Wet op Basiese Diensvoorwaardes (Wet no. 3 van 1983) of ingevolge die Loonwet (Wet 5 van 1957) verskuldig is aan die Respondent nie." (my emphasis)

There is no explanation why the attorney could not get an affidavit from a representative of the applicant if she was able to obtain instructions from the self same representative for purposes of her own affidavit. The attorney has no personal knowledge of the facts she deposed to. She enquired and was told something that is hearsay evidence. I am not satisfied that section 13 has been complied with.

ORDER

[14] The following order is made.

(i) The order made by the Magistrate, Ceres in case number 2964/2000 on 8 February 2001 is hereby suspended pending the inquiry in (ii) below.

(ii) The matter is referred back to the Magistrate to determine whether or not the respondent is an occupier.

(iii) If the respondent is an occupier, then the requirements of the Extension of Security of Tenure Act, 62 of 1997 must be complied with.

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ACTING JUDGE J MOLOTO

For the applicant:
Frans Davin Incorporated, Ceres.

For the respondent:
Absent.