IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at **RANDBURG** on 25 April 2001 **CASE NUMBER**: LCC 18/01
before **Gildenhuys AJ** and **Bam AP**

Decided on 10 May 2001

In the matter between:

HALLÉ, P First Appellant

HALLÉ, JF Second Appellant

and

DOWNS, AH Respondent

JUDGMENT

GILDENHUYS AJ:

[1] This is an appeal against an order for the eviction of the appellants from sub 234 (of 156) of the farm Danse Kraal No 1020 (commonly known as Hydeswood Farm), made by the Additional Magistrate, Ladysmith on 1 November 2000.[1] The first appellant is the husband of the second appellant.

[2] Hydeswood Farm is approximately 80,9 hectares in extent. It was originally owned by the second appellant. She sold the farm to the respondent in July 1994. The farm was transferred into the name of the respondent on 12 October 1994. Despite the sale and transfer, the appellants remained in possession of the farm. The basis of their continued possession is in dispute, but is not relevant for purposes of this appeal.

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1 Written reasons for the order were handed down by the Magistrate on 22 November 2000. In the Notice of Appeal, the appellants stated that they appealed "to the Land Claims Court against the whole of the judgement . . . handed down on 22 November 2000."

[3] On 23 January 1995 a lease agreement was signed between the first appellant (as lessee) and the respondent in terms whereof the respondent let to the first appellant "the dwellings, sheds and other outbuildings, together with the fenced yard surrounding the main dwelling" on Hydeswood farm. I will refer to that land as "the relevant land". The relevant land is approximately 3,8 hectares in extent. According to respondent, the first appellant breached the lease agreement, in that amongst other things he did not pay the rent. This led to the cancellation of the lease, and to a number of court actions. One of the actions was settled on the basis that a family member of the appellants would purchase the relevant land. A deed of alienation was entered into, but the purchaser breached the terms thereof, and the deed of alienation was cancelled.

[4] After the cancellation of the deed of alienation, the respondent issued summons out of the Magistrate's Court, Ladysmith for the eviction of the appellants from the relevant land. The two appellants entered an appearance to defend the action, and filed a plea containing many defences. The only defence relevant to this appeal is contained in a special plea,[2] and is to the effect that the appellants are "occupiers" of Hydeswood Farm as defined in the Extension of Security of Tenure Act,[3] that none of the exclusions of the definition of "occupier" applies to the appellants, that the Tenure Act applies to Hydeswood farm[4] and that the Particulars of Claim do not contain the necessary allegations that the substantive and procedural provisions of the Tenure Act have been complied with.

[5] At the hearing of the case in the Ladysmith Magistrate's Court, it was agreed between the parties that, in order to establish the defence raised in the special plea, the appellants would have to prove that they are "occupiers" as defined in the Tenure Act. The hearing commenced by evidence from the first appellant. The first appellant testified that he had occupied the relevant land mainly for residential purposes. It was put to the first appellant in cross-examination that, when the lease was entered into during January 1995, the leased property was used mainly for industrial or commercial purposes, and

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2 There was also a second special plea filed, which is not relevant to this appeal.

3 Act 62 of 1997. I will refer to that Act as the "Tenure Act".

4 It is common cause that the Tenure Act applies to Hydeswood farm.

that he earned an income in excess of R5 000 per month. For those reasons, so it was suggested, the first appellant does not fall within the definition of "occupier" as contained in the Tenure Act.[5]

[6] Immediately after the first appellant's evidence, the Magistrate dismissed the special plea. He found that it appeared from the evidence of the first appellant that there was a full scale woodworking factory employing some 38 people, a bed and breakfast facility, a soft toy factory, a paint ball shooting range and a bed assembly plant on the relevant land. He also found that the first appellant conceded that he must have earned more than R5 000 per month. The Magistrate did not concern himself with the time periods during which the activities he mentioned had taken place, or during which the first appellant had earned more than R5 000 per month.

[7] According to the first appellant's evidence, all commercial and industrial activities on the relevant land terminated a few months before the summons in the present case was issued. At that stage, the lease has already been cancelled. After the activities terminated, the first appellant took up employment in town.[6] The second appellant's bed and breakfast facility might have continued thereafter: if it did, it was subsidiary to the main purpose (personal residence) for which the first appellant occupied the subject land. However, the first appellant was emphatic that, at least after the industrial and commercial activities on the relevant land came to an end, the relevant land was used <u>mainly</u> for residential purposes.

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5 The definition is contained in section 1 of the Tenure Act, and reads as follows:

> "occupier means a person residing on land which belongs to another person, and who has or [sic] 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;"
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> The "prescribed amount" referred to in para (c) is R5 000. See Regulation R1632, Government Gazette 19587, 18 December 1998.

6 According to the first appellant's evidence, he is earning R1 350 per month from that employment.

[8] The appellants appealed against the whole of the judgment of the Magistrate's Court on the following grounds:

> "1. The Court erred in his interpretation and application of the Extension of Security of Tenure Act (the Tenure Act).
> 2. The Court erred in finding that the First and Second Defendants were excluded from the definition of an 'occupier' within the meaning of the Tenure Act.
> 3. The Court should have held that the First and Second Defendants are 'occupiers' in terms of the Tenure Act."

In his heads of argument before this Court, Mr Loots, for the appellants, stated that the second appellant:

> "concedes that she derives her right as occupier from her marriage with the First Appellant and accordingly withdraws her appeal."

[9] The only issue of substance in this appeal is at what point in time must the first appellant comply with the definition of "occupier" to be entitled to raise the defences available to an occupier under the Tenure Act in the case against him. The Magistrate did not address this question, and was satisfied that the special plea must be dismissed because the first appellant conceded that at some point in time there were a woodworking factory, a bed and breakfast facility, a soft toy factory, a paint ball shooting range and a bed assembly plant on the relevant land, and also conceded that at some point in time he must have earned more than R5 000 per month. These concessions, so the Magistrate found, placed him outside the definition of "occupier".

[10] After the Magistrate dismissed the special plea, Mr Loots requested him to refer the case to this Court for automatic review in terms of section 19(3) of the Tenure Act. The Magistrate was of the view that, insofar as he did not give an order in terms of the Tenure Act, the matter was not subject to automatic review at that point in time.[7] In the matter of *Skhosana and Others v Roos t/a Roos se Oord and Others*[8] this Court held:

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7 Record, paginated p 142, line 20-22.

8 2000 (4) SA 561 (LCC); [1999] 2 All SA 652 (LCC).

> "(T)he Legislature in providing for the automatic review of ESTA cases clearly intended that the Land Claims Court must scrutinise the records of those cases to ensure that the provisions of ESTA were correctly applied. It would be absurd if, on the one hand, an eviction order made under the provisions of ESTA has to be reviewed by this Court while, on the other hand, an eviction order under common law consequent upon a decision that ESTA does not apply, is not subject to such review."[9]

The same conclusion was reached by Dodson J in *Van Zyl NO v Maarman*.[10] Although the Magistrate might have been correct in not sending the case for review until an eviction order was actually granted (albeit not under the Tenure Act), the Magistrate was wrong in his view that the eviction order, because it was not made under the Tenure Act, was not subject to automatic review by this Court. The fact that defences under the Tenure Act were raised and rejected makes the eviction order subject to automatic review. Of course, after an appeal has been noted, the obligation to refer the case for automatic review to the Land Claims Court falls away.[11]

[11] Mr Louw, for the respondent, urged me to follow a purposive approach in interpreting the Tenure Act to ascertain at what point in time a person must be an "occupier" to qualify for protection under the Tenure Act. He submitted that this Court has followed such an approach in various previous decisions, including *Skhosana v Roos*[12] and *Venter NO v Claasen en Andere*.[13] I agree that a purposive approach is appropriate.

[12] The preamble to the Tenure Act gives an indication of its purpose:

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9 Above n 8 at para [12].

10 2000 (1) SA 957 (LCC); [2000] 4 All SA 212 (LCC) at para [22].

11 Section 19(4) of the Tenure Act.

12 Above n 8 at para [10].

13 2001 (1) SA 720 (LCC) at para [8]:

> "Daar moet egter gekyk word na die agtergrond en doelstellings van die Verblyfregwet, en die onreg wat dit probeer bekamp. Indien&n letterknegtelike uitleg van&n statutêre bepaling absurde resultate tot gevolg sal hê of resultate wat die Wetgewer nooit kon bedoel het nie, is dit vir die Hof nodig om &n doelgerigte uitleg aan die bepaling te gee."

> "WHEREAS many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction;
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> WHEREAS unfair evictions lead to great hardship, conflict and social instability;
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> AND WHEREAS it is desirable-
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> . . .
>
> that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners;
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> that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances;
>
> to ensure that occupiers are not further prejudiced;"

The "vulnerable occupiers" must be those not using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes and those who do not have an income in excess of R5 000.[14] One of the social objectives of the Tenure Act is to ensure that vulnerable people are not unfairly thrown onto the streets, and are given a fair opportunity to find alternative accommodation.

[13] In my view, the Tenure Act requires the circumstances of a person whose eviction is sought to be considered as at the time when his eviction was called for, in order to ascertain whether he is an "occupier".[15] That would usually be the time when legal proceedings for his eviction are commenced, but it may even be later, should circumstances change during the course of the litigation. A person who, at that point in time, complies with the definition of "occupier" is entitled to raise the defences available to an occupier under the Tenure Act. To hold otherwise would lead to incongruous results, as I will attempt to show hereunder.

[14] Mr Louw, for the respondent, submitted that regard must be had to the whole period during which a person resided on the land concerned to determine whether he is an occupier or not. If during the major portion of that period he did not comply with the definition, compliance during the balance

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14 See the definition of "occupier" quoted at n 5 above.

15 If any one of the exclusions in the definition of "occupier" applies at that stage, then the person concerned would not be an "occupier".

of the period, so he argued, would be insufficient to make him an occupier. That cannot be correct. Take, for instance, a person who resided on land for a period of say five years. During the first four years he had an income of less than R5 000 per month. Thereafter he was favoured by fortune, and his monthly income increased to well beyond R5 000, taking him out of the category of vulnerable persons, as envisaged in the Tenure Act. Why should he still be entitled to the protections given to an occupier under the Tenure Act? On the other hand, if this same person earned an income well in excess of R5 000 per month during the first four years and thereafter ran into hard times, with his monthly income dropping to virtually nothing, he would become a vulnerable person. Why should he then be denied the protection of the Tenure Act, just because in the past he had earned a monthly income in excess of R5 000?

[15] Mr Louw referred me to the judgment of the Supreme Court of Appeal in the matter of *Ncgobo and Others v Salimba CC*; *Ncgobo v van Rensburg*.[16] That case dealt in part with an appeal from a judgment of this Court concerning the proviso relating to "farmworker" in the definition of "labour tenant" in section 1 of the Land Reform (Labour Tentants) Act.[17] Olivier JA, who delivered the judgment, held as follows:

> "[26] In my view, the only way to make sense of the confusion reigning in this area is to conclude that the proviso relating to 'farmworker' cannot, for the reasons advanced above, refer only to the present time. It must refer to the whole period in respect of which the present occupier, whose occupation is under attack, has been occupying the land in question. . .

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16 1999 (2) SA 1057 (SCA); [1999] 2 All SA 491 (A).

17 Act 3 of 1996. The definition reads as follows:

> "Labour tenant means a person -
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> (a) who is residing or has the right to reside on a farm;
> (b) who has or has had the right to use cropping or grazing land, on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee; and
> (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,
>
> including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3 (4) and (5), but excluding a farmworker;"

[27] If one approaches the definition in this holistic or continuous sense, it follows that what has to be established is the predominant quality of occupation over the whole period during which the present occupier has been complying with paras (a) and (b). It may be, as illustrated above, that in respect of some periods the remuneration paid to the occupier in cash or some other form of remuneration (see para (a) of the definition of 'farmworker') may have exceeded the value of the right to occupy and use the land; and *vice versa*. What we have to find is the overall sense and value of the occupation. The present time is but one moment in this continuum."[18]

In my view, the purpose of the Land Reform (Labour Tenants) Act is entirely different from that of the Tenure Act. It provides for the acquisition of land by labour tenants.[19] It would be contrary to the spirit of that Act to deny to a person the benefits provided to a labour tenant if for one moment in the continuum of his occupation he did not comply with the definition of labour tenant. The same considerations do not apply to defences against eviction contained in the Tenure Act.

[16] The first appellant is older than sixty years of age. If the period during which the second appellant was the owner of Hydeswood farm is included,[20] he lived on the farm for much longer than ten years, albeit not always in the capacity of an "occupier". Mr Louw submitted that section 8(4) of the Tenure Act[21] might prevent the respondent from terminating the first appellant's right of residence if the few months during which the first appellant complied with the definition of "occupier" would entitle him to the protection of that section. The legislature could not, so Mr Louw argued, have intended such an unfair result. I do not think that the interpretation of section 8(4) as suggested by Mr Louw, is

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18 Above n 16.

19 See the preamble to the Land Reform (Labour Tenants) Act.

20 During that period, the first appellant lived on the farm as the husband of the second appellant.

19 Section 8(4) reads as follows:

"The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and-

(a) has reached the age of 60 years; or

(b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,

may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach."

correct. Before a person is entitled to the protection of section 8(4), he must have resided on the land in question for a period of ten years in his capacity as an "occupier" of that land. If he was, for a portion of the ten year period, not an "occupier" but a resident in some other capacity, section 8(4) will probably not apply.

[17] The evidence of the first appellant indicates that for a period of several months before the summons for his eviction in the present case was served on him, he complied with the definition of "occupier" in terms of the Tenure Act. That is, however, not the end of the matter. The Magistrate dismissed the special plea because he found, erroneously in my view, that the first appellant on his own evidence is not an occupier. He did not hear any evidence from the respondent on that issue. It may well be that the respondent is in a position to adduce evidence which indicates that even after the commercial and industrial activities on the relevant land were terminated, the first appellant is still not an "occupier". If such evidence is preferred over the evidence of the first appellant, the special plea may well succeed. The matter will therefore have to be referred back to the Magistrate to give the respondent an opportunity to present evidence on the issues raised in the special plea.

[18] During the hearing of the appeal I asked Mr Loots why the first appellant, while maintaining that all industrial and commercial activities on the relevant land have come to an end, still holds on to possession of a shed, an office building, an ablution block and change rooms which were specifically erected and used for industrial or commercial purposes. After taking instructions from the first appellant, Mr Loots conceded that the first appellant should give up possession of the shed, the office building, the ablution block and the change rooms. This concession was made without prejudice to any financial claims which the first appellant might have in respect of the shed, the office building, the ablution block and the change rooms.

[19] The first appellant did not ask for costs. In conformity with the customary approach of this Court, no order for costs is made.

[20] The appeal succeeds. It is ordered as follows:

(a) The following orders by the Magistrate are set aside:

(i) The order made on 16 October 2000, dismissing the first special plea;

(ii) The order made on 1 November 2000, authorising the eviction of first appellant from the property known as Hydeswood farm, Ladysmith, and awarding costs of the action.

(b) As agreed by him, the first appellant must give up his occupation of the shed, the office building, the ablution block and the change rooms situated on the land which he occupies on Hydeswood farm.

(c) The matter is remitted to the Magistrate to hear evidence to be submitted by the respondent on the issues raised in the special plea, and thereafter to adjudicate on those issues and to dispose of the rest of the case.

(d) No order is made in respect of costs.

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ACTING JUDGE A GILDENHUYS

I agree

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ACTING JUDGE PRESIDENT F BAM

For the appellants:
Loots Attorneys, Pietermaritzburg.

For the respondent:
Mr M Louw, *C A Botha & Partners, Ladysmith.*