

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **Meer AJ**

CASE NUMBER: LCC 76R/01

MAGISTRATE'S COURT CASE NUMBER: 1678/01

Decided on: 15 August 2001

In the review proceedings in the case between:

MALAN, P du T

Applicant

and

BAILEY, H

1st Respondent

BAILEY, J

2nd Respondent

AFRICA, I

3rd Respondent

AFRICA, F

4th Respondent

JUDGMENT

MEER AJ:

[1] This is an automatic review under section 19(3) of the Extension of Security of Tenure Act¹ (herein referred to as “the Act”) of an order granted by the Magistrate, Wellington on 24 July 2001, for the eviction of the respondents from the applicant’s farm, being the remainder of Erf 9142, commonly known as Hexberg, Wellington (herein referred to as “the farm”). The eviction order was granted in the absence of the respondents who did not defend the application for their eviction.

[2] From the founding affidavit it emerges that the first respondent was employed by the applicant as a farm labourer and his right of residence stemmed from his contract of employment. The other respondents resided in the house occupied by the first respondent with the applicant’s permission on account of their association with him, and accordingly their rights of residence also stemmed from his contract of employment. According to the founding affidavit the first respondent commenced

1 Act 62 of 1997, as amended.

employment with the applicant in about 1996 and his contract of employment was terminated on 1 December 2000.

[3] For an eviction order to be granted, there must be compliance with all of the peremptory requirements specified at section 9 of the Act.² Of these I am unable to find compliance with sections 9(2)(a), 9(2)(c) and 9(3). I am able to find only partial compliance with section 9(2)(b). Accordingly I am unable to confirm the eviction order.

2 Section 9 reads as follows:

“(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(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
 - (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.

(3) 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-

- (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.”

Compliance with section 9(2)

[4] The founding affidavit states that the right of residence was terminated in accordance with section 8(2) of the Act,³ in that the first respondent was dismissed in accordance with the provisions of the Labour Relations Act.⁴ There is however no explanation as to the facts and circumstances pertaining to his dismissal which would have enable the learned magistrate to conclude that the dismissal was indeed in accordance with the requirements of the Labour Relations Act.⁵ The founding affidavit makes the bald statement that the first respondent's conduct that led to his dismissal constituted a fundamental breach of the relationship between the applicant and the first respondent as contemplated at section 10(1)(c) of the Act.⁶ Once again, there are no facts and circumstances substantiating what constituted the fundamental breach. In the absence of information pertaining thereto, the learned magistrate ought not to have granted the eviction order.

[5] I am able to find only partial compliance with section 9(2)(b) of the Act, in that only the first respondent was given a notice by when to vacate the premises as contemplated at section 9(2)(b).⁷ No

3 Section 8(2) reads 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.”

4 Act 66 of 1995.

5 Annexure “A” to the founding affidavit, being a notice dated 1 December 2000 to presumably, the first respondent from the applicant, cites a charge against the first respondent of absenteeism from work since 13 November 2000. It also stated that the first respondent failed to attend a disciplinary hearing. Whilst the letter may throw some light on the possible reasons for the termination of the first respondent's employment, one cannot ascertain from this letter alone whether the dismissal was in accordance with the Labour Relations Act. One also cannot determine from the notice whether the first respondent had committed a fundamental breach of the relationship as contemplated at section 10(1)(c) of the Act.

6 Section 10(1)(c) reads:

“(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-

...

(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;”

7 I am prepared to accept that the first respondent was given notice, even though the notice, being annexure “A” is not specifically addressed to the first respondent by name. This I do on the basis that the founding

such notice was given to any of the other respondents. Therefore there can be no compliance with section 9(2)(a) with respect to the other respondents as well.

[6] Section 9(2)(c) of the Act has not been complied with. From the papers before me (and indeed those before the learned magistrate) it is not possible to assess whether the conditions for an eviction order in terms of section 10(1)(c) have been complied with. There is no information upon which to assess whether the first respondent's conduct constituted a breach as contemplated at section 10(1)(c), as is alleged in the founding affidavit.

[7] I am able to find compliance with section 9(2)(d), in that the requisite notices as set out therein were given.

Compliance with section 9(3)

[8] There has been a failure to comply with section 9(3). The section requires the Court to request a report on various matters set down at sub-sections 9(3)(a) to (d). It is of extreme concern to me that despite various judgments of this Court⁸ emphasising the importance of a section 9(3) report, it is possible for an eviction order to be granted in the absence of such a report.

affidavit refers to annexure "A" as being a notice to the first respondent.

8 See for example *Valley Packers Co-Operative Limited v Dietloff and Another* [2001] 2 All SA 30 (LCC) *Glen Elgin Trust v Titus and Another* [2001] 2 All SA 86 (LCC). Compare *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons and Another* 2001 (1) SA 1017 (LCC); [2000] 3 All SA 279 (LCC).

[9] In the circumstances I make the following order.

1. The eviction order granted by the Magistrate, Wellington in case 1678/01 on 24 July 2001, is set aside in its entirety.

ACTING JUDGE Y S MEER

For the applicant:

Van der Spuy en Potgieter Attorneys, Wellington.

For the respondents:

Absent.