

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

In chambers: **MOLOTO J**

CASE NUMBER: LCC31R/04

MAGISTRATE'S COURT CASE NUMBER: 6497/03

Decided on: 28 June 2004

In the review proceedings in the case between:

L HURWITZ t/a LEASHOF

Applicant

and

F J BRITS

Respondent

JUDGMENT

MOLOTO J:

[1] The magistrate, Paarl granted an order on 15 March 2004 in terms of the Extension of Security of Tenure Act¹ ("the Act"), evicting the defendant from the plaintiff's farm known as Silverlining Farm, Wemmershoek Road, Paarl. The order of the magistrate was sent to this Court on automatic review in terms of section 19(3) of the Act.

[2] On 29 March 2004 a query was dispatched to the magistrate in the following terms: -

"The following queries have been raised by the reviewing judge for your attention. Please let me have your responses and the file back as soon as possible so that the judge may finalise the review.

- 1 According to the summons and particulars of claim and notice of application for ejection, the defendant resides at Silverlining Farm, Wemmershoek Road, Paarl and ejection is sought from the said farm. Yet the order of court ejects the defendant from the farm Leashof with no explanation of where it is or how it relates to Silverlining farm. What is the correct situation?
- 2 Notice of application for eviction dated 15 October 2003 was set down for 12 December 2003. It was served on respondent and Drakenstein Municipality on 25 November 2003, and 26 November 2003 respectively, 18 December 2003 (date stamp). Section 9(2)(d) provides that service should be 2 months prior to commencement of hearing of the matter.
- 3 The notice of application was served on Department of Land Affairs on 18 December 2003 when the hearing commenced on 12 December 2003.
- 4 Case brought by way of action and notice of motion at the same time. Why?

1 Act 62 of 1997, as amended

- 5 A second set of a notice of motion dated 17 December 2003 and set down for 19 February 2004 was served on the Drakenstein Municipality and DLA on 18 December 2003.
- 6 To the notice of motion referred to in par (5) above is annexed notice in terms of section 9(2)(d)(i) to the defendant. Return of service relative to this notice states: "Proses gedien. Sien "opmerkings". Opmerkings state "Sien aanhangsel." The "aanhangsel" does not show that it emanates from the Sheriff's office and bears no date stamp of the Sheriff. The signature on the "aanhangsel" does not resemble that on the Return of Service. What is the correct position?
- 7 There is no proof of service of this latest set of notice of motion on the respondent.
- 8 The provisions of section 9(2)(c) are not dealt with.
- 9 Which of the three processes - summons and two sets of notice of motion was the process relied upon for the eviction of the defendant/respondent?
- 10 There is no evidence that the magistrate satisfied himself as to the provisions of section 13 relative to standing crops. Section 13 is preemptory.
- 11 Is it regular to issue three different processes regarding the same cause of action? If not regular, what is the consequence of such irregularity?"

[3] The magistrate replied as follows: -

Ad Paragraph 1

The reference to Leas Hof is a *bona fide* fault on my part and should read : Dat die respondent gelas word om die woning op die plaas Silwerlining te ontruim voor of op 20 Maart 2004.

Ad Paragraph 2

Summons was issued against the Defendant on 10 September 2003 and served on the Defendant on 18 September 2003 for arrear rent and for ejection. Request for default judgment was made on 1 October 2003. On 3 October 2003 the magistrate raised the question as to whether Esta / PIE was not applicable. The correct order that the court should have made was that the application for default judgment should be denied.

The applicant then brought an application for eviction in terms of ESTA on 12 December 2003. On the 12th of December the matter was remanded by agreement as it appeared that the requirement of section 9(2)(d) was not complied with. The question was whether the application should also have been dismissed or whether a remand under the circumstances would cure the defect. I was of the view that a remand would cure the defect and would also save cost for the applicant.

Ad Paragraph 3

The matter was remanded to the 19th of February in order for the applicant to serve notices on the Department of Land Affairs and the Municipality as is required by section 9(2)(d). Hence the long remand. The respondent also agreed to the remand and was present at court on 12 December 2003. The Notice form E should also be read in conjunction with the second Notice of Motion dated 17 December 2003.

Ad Paragraph 4 and 5 and 7

The summons and the first notice of motion should be disregarded as it did not comply with the requirements of the act and should have been dismissed on 3 October 2003 and 12 December 2003 respectively. The only Notice of Motion that the court relied on was the Notice served on 17 December 2003.

Ad Paragraph 6 - 11

The matter was remanded to 19 February 2004. I respectively are of the view that the Notice was served on the respondent. He appeared on 19 February 2004 and his rights to Legal representation was explained. The probationary officers report was also discussed with him. It seems clear that no compensation was due to the respondent for services rendered. The respondent lived on the farm in terms of a rental agreement. The terms of the agreement was fair. The respondent did not comply with the agreement. See return of Service under case 7940/03 attached.

Reasons as to why the request is answered late

I wish to apologize for the late answering of your request for written submissions. I was on study leave and received the request on my return on 19 May 2004 and immediately phoned your secretary.”

[4] The reply from the magistrate does not address queries (7) fully and (8) and (11) at all. As regards query (7), it may be so that the respondent attended court on the day of hearing, but that does not necessarily mean he got two months’ written notice of the date of hearing. It has also not been shown that the municipality and the Department of Land Affairs got the requisite two months’ notice. Section 9(2)(c) relates to determining which of sections 10 and 11 is applicable to the case with respect to the grounds of eviction. Finally, it is my view that it is irregular to issue three processes initiating action on the same cause of action between the same parties and then to proceed on one of them without withdrawing the other two.

[5] In the circumstances, the following order is made :

The order of the magistrate, Paarl, made on 15 March 2004 in this matter is hereby set aside in whole and the following order substituted therefor:

“Plaintiff’s claim is dismissed. There is no order made as to costs.”

JUDGE J MOLOTO

For the applicant:
J Oosthuizen of Minitzers Attorneys, Paarl.

For the respondent:
In person.