IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **Cape Town** on 10 February 2004 **CASE NUMBER**: LCC27R/03
before **Moloto J** **MAGISTRATE'S COURT CASE NUMBER:** 225/99

Decided on: 20 February 2004

In the matter between:

VISSER, WILLEM JOHANNES Appellant

and

HARTZENBERG, CHRISTIAAN Respondent

JUDGMENT

MOLOTO J:

[1] This is an application for condonation of the late noting of an appeal and also an appeal against the judgment of the Magistrate, Stellenbosch handed down on 30 September 2002. The appellant had issued summons in the said magistrate's court for the eviction of the respondent in terms of the Extension of Security of Tenure Act[1] ("ESTA"). The appellant is the owner of a farm known as Uitsig Plaas, portion 27 of the consolidated farm Welmoed Estate No 468, Division of Stellenbosch ("the farm"). The respondent is an occupier within the meaning of that term as defined in ESTA, on the farm. The appellant wanted the respondent evicted from the farm, allegedly because the respondent sold liquor and dagga from his premises on the farm. The appellant's case was dismissed by the magistrate, and he now comes before this Court on appeal against the magistrate's order. However, the appeal was noted late, hence there is also an application for condonation of the late noting of the appeal. I will deal with the application for condonation first.

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1 Act 62 of 1997, as amended

[2] The notice of application reads thus :

"(1) Dat 'n verlenging van die tydperk van 20 (TWINTIG) dae waarbinne 'n appèl, in terme van Landdroshofreël 51(3) gebring moet word, toegestaan word.

(2) Dat 'n verlenging van die tydperk van 40 (VEERTIG) dae waarbinne 'n aansoek om 'n verhoordatum by die Griffier van hierdie Agbare Hof, in terme van Hooggeregshofreël 50(4)(a), gedoen moet word, toegestaan sal word.

(3) Dat 'n verlenging van die vervaltydperk van 60 (SESTIG) dae, wat in terme van Hooggeregshofreël 50(1) voorgeskryf word, toegestaan word sodat Appelant se appèl sal herleef.

(4) Dat die Respondent beveel sal word om die koste van hierdie aansoek te betaal slegs in die geval dat die Respondent hierdie aansoek sou opponeer.

(5) Verdere en/of alternatiewe regshulp."

[3] Rule 71(1) of the Rules of this Court provides that : -

"(1) Any party that has appealed against a decision of a magistrate's court over which the Court enjoys appellate jurisdiction must prosecute such appeal in the Court in the same manner as a civil appeal from a magistrate's court to the Supreme Court."

[4] Rule 51, where relevant, of the Rules of the magistrate's court provides that : -

"(3) An appeal may be noted within 20 days after the date of the judgment appealed against or within 20 days after the clerk of the court has so supplied a copy of the written judgment to the party applying therefore, whichever period shall be the longer.

(4) An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondents' costs of appeal to the amount of R1000 : Provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board.

(9) The party noting an appeal or a cross-appeal shall prosecute the same within such time as may be prescribed by rule of the Court of appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the Court of appeal shall see fit to make an order to the contrary."

[5] The relevant provisions of Rule 50 of the Uniform Rules, in turn provide that: -

"(1) An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.

(4)(a) The appellant shall, within 40 days of noting the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the

same time make available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented.

(b) In the absence of such an application by the appellant, the respondent may at any time before expiry of the period of 60 days referred to in subrule (1) apply for a date of hearing in like manner.

(c) Upon receipt of such an application from appellant or respondent the appeal shall be deemed to have been duly prosecuted."

[6] The facts forming the background to the application are briefly that on 20 August 2002, which was the last day of the hearing before judgment was delivered, the magistrate indicated that he would hand down the judgment on 30 September 2002. The appellant, who was represented by counsel, was in court when the magistrate made the statement. Judgment was duly handed down on 30 September 2002. Notice of appeal was filed on 26 February 2003, some 149 days or almost five months after delivery of the judgment. The appellant served a notice giving security for costs on 26 March 2003, and filed the application for condonation on 28 October 2003.

[7] Before dealing with the application, I note the following in respect of the application: -

(1) that the appellant having failed to provide security for costs at the time of noting the appeal, has not applied for condonation of this failure. Rule 51(4) of the magistrate's court quoted above provides that "an appeal shall be noted by delivery of notice and . . . by giving security . . .". It follows that unless the Court of Appeal orders otherwise, failure to give security at the time of noting the appeal will result in a defective notice of appeal. This Court did not exempt the appellant from giving such security.

(2) Rule 50(9) of the uniform Rules determines :

> "not less than 15 days before the appeal is heard the appellant shall deliver one copy of a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal. . ."

The appellant did not comply with this subrule and did not pray for condonation of such failure.

(3) The appellant proffers no explanation for the 8 months' delay in launching his application for condonation from the date he noted the appeal. Neither does the appellant pray for condonation of this delay. "Whenever an appellant realises that he has not complied with a rule of Court, he should apply for condonation without delay."[2]

[8] I turn now to the reasons for the delay in noting the appeal. The affidavit deposed to by the appellant in support of the application goes into 9 pages made up of 36 paragraphs, yet gives no reason for the delay. The only averment relevant to the application is to the effect that the appellant became aware of the judgment in February 2003. No explanation is given of what the appellant did on becoming aware to ensure the appeal is noted as soon as possible after he became aware in February 2003. The appellant's attorney also filed an affidavit in support of the application. The relevant part of this affidavit states that one G J Louw ("Louw") was employed in the attorney's firm from the beginning of September 2002 and he was responsible for this matter. It is not mentioned in what capacity Louw was employed or what knowledge of and experience in the law he had. The deponent states that he made an undated note for Louw on a facsimile page to the effect that "kliënt moet 'n afskrif (van die uitspraak) kry. Adv Marais moet adviseer op appèl. Tyd gaan verby." Thereafter the matter was left completely in Louw's hands. No mention of diarising, either by the attorney or Louw for purposes of follow up is made. The attorney's affidavit continues: -

> "(9) Aan die einde van Desember 2002 het Mnr Louw sy tydelike dienste by my firma beëindig. Nadat ek die nota op die faksblad van 30 September 2002 gemaak het, het ek nie weer die lêer onder oë gehad nie. Ek het dus nooit weer nagegaan of my opdragte inderdaad uitgevoer was nie. Desember 2002 en Januarie 2003 is ook die tradisionele vakansiemaande en het ek bloot nooit daaraan gedink om die aangeleentheid op te volg nie. Ek het toe ook geen professionele hulp in my firma gehad nie."

[9] How the deponent determines that the undated note on the facsimile page was on 30 September 2002 escapes me. The quoted paragraph speaks for itself on the gross negligence of the attorney. Furthermore the attorney did not check the matter on his return from holiday. On his own admission, the first time he next became aware of the matter was when the was served with a notice of taxation on 3 February 2003. On this day he discovered that the appellant had

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2 *Rennie v Kamby Farms (Pty) Ltd* 1989(2) SA 124 (A) at 129G; see also *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40I-41.

not been furnished with a copy of the judgment, despite the appellant having enquired by letter dated 29 October 2002. The attorney had not been aware of the letter. He then obtained instructions on 6 February 2003 to proceed with the appeal. Instead of noting the appeal immediately the attorney, according to his affidavit, went into an exchange of correspondence with the respondent's attorneys from 6 February 2003 up to 26 February 2003. All this correspondence is irrelevant to explaining the delay in noting the appeal, hence the less said about it the better. However, the upshot of it all is that the appeal was only noted on 26 February 2003 and no explanation for the delay from 6 February 2003 to 26 February 2003 is offered. Nothing further is mentioned in the attorney's affidavit to explain the delay. The appeal is noted unaccompanied by either security for costs or an application for condonation. I have already referred to these latter omissions and do not wish to repeat them here, except when considering the conduct of the attorney in managing the appellant's affairs.

[10] The appellant is said to have telephoned his attorney's firm on 29 October 2002 and dispatched a letter of the same date enquiring after progress in the matter. He was in Court when the magistrate said he would hand down judgment on 30 September 2002, yet he waits until 29 October 2002 before making any enquiries. He does not explain why he waited that long before making inquiries. No further action on his part is reported. He has not explained his inaction and that amounts to negligence in the extreme.

[11] The reasons, if they are reasons at all, for the delay fall far short of explaining the delay. When coupled with the omissions to apply for condonation of failure to provide security for costs timeously, to provide a statement of the main points and to apply for condonation of late noting of appeal timeously, it becomes clear that the application ought not to be granted. Even if it was granted in its form, it would still be defective in the respects I have just referred to and liable to be dismissed.

[12] The attorney's conduct in prosecuting this matter is nothing short of a reckless disregard of his professional duties, deserving of attention from those in control of the affairs of the attorney's profession. Not only the prosecution of this case, but also the management of his office leaves much to be desired. There does not seem to be a proper supervision of staff, or a system that enables regular checks or diarising of matters or of dealing with incoming

correspondence or updating clients on their matters. The lack of professional staff or having such staff for short periods can never be an explanation for the shoddy manner in which this matter was handled or the office is run. There is a limit to the extent to which the negligence of an attorney can be used to shield a client. Even then, there must be an acceptable explanation therefor.

[13] As the last factor on whether the application ought to be dismissed, I look at the appellant's prospects of success. Good prospects may overshadow short-comings in the prosecution of the appeal.[3] The grounds of appeal were stated as follows (I quote *verbatim*): -

> "1 Die Geleerde Landdros het fouteer deur te bevind dat die bepaling van artikel 10(1)(a) van die Wet op die Uitbreiding van Sekerheid van Verblyfreg, 1997 (Wet nr 62 van 1997 nie op die onderhawige (sic) saak van toepassing was nie.
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> 2 Die Geleerde Landdros het fouteer deur te bevind dat dit gemeensaak was dat artikel 10(1)(a) nie van toepassing was nie en het voorts fouteer deur te bevind dat daar op geen stadium beweringe gemaak is dat Respondent artikel 6(3) oortree het nie.
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> 3 Die Geleerde Landdros het fouteer deur te bevind dat Appellant nie geslaag het dat Respondent se optrede 'n fundamentele verbreking tot gevolg gehad het nie en dat dit nie prakties moontlik was om dit te herstel nie.
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> 4 Die Geleerde Landdros het fouteer in sy bevinding dat die optrede van Respondent sodanig was dat die bepalings van artikel 10(1)(c) nie bevredig was nie. In die opsig het die Geleerde Landdros fouteer deur nie na behore of enigsins die getuienis op rekord ten spyte van die erns van die onregmatige optrede van Respondent te oorweeg nie.
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> 5 Die Geleerde Landdros het fouteer deur die gesag waarna hy verwys ter ondersteuning vir sy bevinding nie in die konteks daarvan na behore van die feit van die onderhawige feite van toepasing te maak nie.
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> 6 Die Geleerde Landdros het in die lig van al die feite fouteer deur 'n koste bevel teen die Appellant te maak."

[14] Quite clearly, appellant first relied on a breach by the respondent of section 10(1)(a), (b) and (c) of ESTA. The section provides that: -

> "(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if-
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> (a) the occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;

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3 *Est Woolf v Johns* 1968 (4) SA 492 (A).

> (b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calender month's notice in writing to do so;
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> (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;"

[15] Section 6(3) in turn provides that: -

> "(3) An occupier may not -
>
> (a) intentionally and unlawfully harm any other person occupying the land;
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> (b) intentionally and unlawfully cause material damage to the property of the owner or person in charge;
>
> (c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or
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> (d) enable or assist unauthorised persons to establish new dwellings on the land in question."

[16] The respondent (defendant in the court a quo) requested further particulars with respect to section 10(1)(a), (b) and (c) in the following terms:

> "3.4 Word dit beweer dat die verweerder 'n verbreking soos beoog in artikel 10(1)(a), (b) of (c) van die Wet op die Uitbreiding van Sekerheid van Verblyfreg, 62 van 1997, begaan het, en indien wel, word 'n presiese beskrywing van welke presiese verbreking beweer word, verlang."

[17] In response, a "aanvullende antwoord op verweerder se versoek om nadere besonderhede" was delivered. It reads: -

> "(1) <u>Ad paragraaf 3.4</u>
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> Eiser steun op 'n verbreking van artikel 10(b) & (c) (sic) deurdat die verweerder met drank handel gedryf het op die perseel, en dat daar beide 'n hoeveelheid drank asook dagga op die verweerder se perseel gevind is. Verweerder is dissiplinêr verhoor en ontslaan."

[18] In this response reliance on section 10(1)(a) has clearly been abandoned and I shall not deal with it any further. In any case, the conduct of the respondent does not amount to a breach of section 6(3), to which section 10(1)(a) refers.

[19] With regard to section 10(1)(b) it was contended on behalf of the respondent that form "G", being the one calender month's notice referred to in section 10(1)(b), was never served on the respondent. This contention was not disputed and there was no proof of service of the form. Another undisputed contention on behalf of the respondent was that he did not trade in liquor and dagga, but rather his son did, and as soon as he (the respondent) became aware of such trading, he chased the son away from the appellant's farm. Thereafter there was no trading in liquor and/or dagga any longer on respondent's premises, a fact confirmed by both the appellant and the respondent in the court a quo. I must mention, though, that a new complaint of trading in liquor was made after the magistrate had delivered his judgment. That complaint, which was not before the magistrate and over which he did not adjudicate, should not, without ado, be before this Court when dealing with an application relating to the magistrate's judgment. I will therefore disregard it.

[20] The respondent acted promptly to remove his son from the premises upon becoming aware of the son's activities, therefore it is difficult to comprehend how the respondent can be guilty of breaching section 10(1)(c). In the first place he did not engage in such unacceptable activities, secondly he acted without delay on discovering them. These appear to be the actions that would engender a relationship of trust and good neighbourliness between the parties. The respondent is a 70 year old man who has been on the farm with the appellant since 1987 when the latter acquired the farm. In all this time there has never been a complaint of this nature. With the first complaint the respondent was summarily dismissed and proceedings instituted to evict him, notwithstanding how he reacted to the complaint. I am not satisfied that it can rightly be said that the respondent breached section 10(1)(c) of ESTA.

[21] In the premises, the appellant has not shown that he has prospects of success on appeal.

[22] The magistrate granted costs in his order dismissing the appellant's claim. This Court has, in a number of judgments,[4] held that costs should not be granted as a matter of course, as this is social legislation. Costs are only granted in exceptional cases. For the reasons I have already

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4 *Ntuli v Smit* [1999] 2 All SA 1 (1999 (2) SA 540) (LCC); *Serole v Pienaar* [1999] 1 SA 562 (2001(1) SA 328) (LCC).

given about the handling of this matter, this is a case in which costs *de bonis propiis* would be justified, but because such an order was not prayed for, I will not order same. The conduct of the trial in the court *a quo* was carried out in a similar cavelier manner as was displayed in the prosecution of this application. I did not refer to it as it was not absolutely apposite, but I am satisfied that such approach justified the magistrate in granting costs. I am also satisfied that the circumstances of this application are exceptional enough to warrant a cost order.

[23] The following order is made :

"The application is dismissed with costs."

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JUDGE J MOLOTO

For the appellant:
Adv J Marais instructed by *Johan Marais & Associates*, Stellenbosch

For the respondent:
Mr J D Van der Merwe of *Chennells Albertyn*, Stellenbosch.